TEXAS REGISTER

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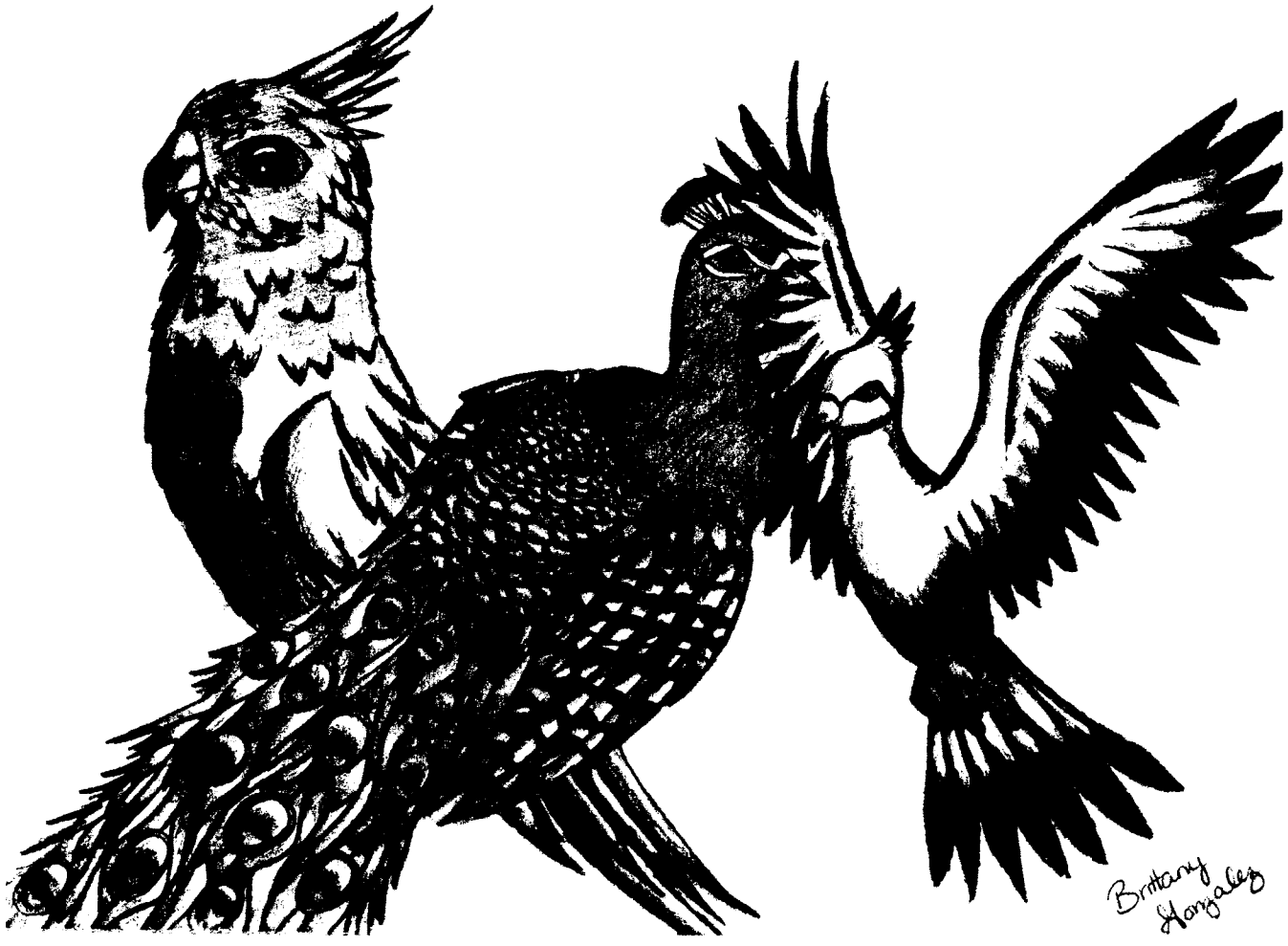

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

ADOPTED RULES

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0714-GA

Requestor:

The Honorable Beverly Woolley

Chair, Committee on Calendars

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Meaning of the term "administrative costs" for purposes of section 352.1015(c), Tax Code, which relates to the expenditures of revenue from the hotel occupancy tax (RQ-0714-GA)

Briefs requested by July 4, 2008

RQ-0715-GA

Requestor:

The Honorable Elton R. Mathis

Waller County Criminal District Attorney

846 Sixth Street, Suite 1

Hempstead, Texas 77445

Re: Whether the offices of an appraisal district must be physically located within the boundaries of the appraisal district's county (RQ-0715-GA)

Briefs requested by July 7, 2008

RQ-0716-GA

Requestor:

Dr. Raymund A. Paredes

Commissioner of Higher Education

Texas Higher Education Coordinating Board

Post Office Box 12788

Austin, Texas 78711-2788

Re: Whether the Higher Education Coordinating Board's standard method of calculating high school grade point averages must be followed by independent school districts (RQ-0716-GA)

Briefs requested by July 7, 2008

RQ-0717-GA

Requestor:

The Honorable Bobby Lockhart

Bowie County Criminal District Attorney

Post Office Box 3030

Texarkana, Texas 75504

Re: Authority of City of Texarkana municipal police officers in the state of Arkansas under various circumstances (RQ-0717-GA)

Briefs requested by July 10, 2008

For further information, please access the website at www.oag.state.tx.us. or call the Opinion Committee at (512) 463-2110.

TRD-200803019
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: June 11, 2008

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 16. HISTORIC SITES

13 TAC §16.3

The Texas Historical Commission (Commission) proposes new Chapter 16, §16.3, relating to Addition of Historic Sites to Texas Historical Commission Historic Sites Program. The purpose of this section is to describe the circumstances under which the Texas Historical Commission may acquire new historic sites that will be administered by the Commission. The Commission will not accept properties into the Historic Site program strictly for preservation of the resource. Acquisition is based on a comprehensive evaluation of the property's ability to best serve the citizens of Texas as an interpreted site within the resources available to the Commission. The Commission operates a system of state historic sites as mandated by the Texas Legislature in House Bill 12 (Act of May 29, 2007, Chapter 1159, §§11 - 12, Regular Session, 80th Legislature). The Commission's mission is to protect and preserve the state's historic and prehistoric resources for the use, education and enjoyment and economic benefit of present and future generations.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the rule is in effect there will not be fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Oaks has also determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of this new rule will be an orderly and well-defined program for the acquisition of new historic sites by the Commission. Additionally, Mr. Oaks has determined that there will be no effect on small or micro businesses. There will be no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register*.

The new section is proposed under the Texas Government Code §442.005, which provides the Commission with authority to promulgate rules that will reasonably effect the purposes of this chapter, and Texas Government Code §442.075, which provides that the Commission may accept the transfer of additional historic sites.

No other code, article, or statute is affected by this proposal.

§16.3. Addition of Historic Sites to Texas Historical Commission Historic Sites Program.

(a) Criteria. Consideration for accepting a historic property for development as a Texas Historical Commission (Commission) historic site will be based on the following criteria:

(1) The property must have recognized statewide or national significance based on the standards of the National Register of Historic Places.

(2) The property should be able to provide interpretation of a significant theme or event of Texas history that is not fully represented by the Commission's existing historic sites or other historic sites accessible to the public. The Commission will strive to maintain a geographic, cultural and thematic balance in its program.

(3) The property should have exceptional integrity of location (including surrounding environment), design, material, setting, feeling, and association.

(4) The property should have appropriate collections (objects, manuscript material, artifacts) associated with the historic site or necessary artifacts related to the site's history and period of significance should be identified and available.

(5) The property must be appropriate for use as an interpretive museum or historic site, have high potential to attract and accommodate diverse and new audiences, and be accessible to travelers as well as to the local community.

(6) The property must be available without restrictions that would limit the Commission's options for preservation and interpretation as a historic site (for example, a life estate retained by the grantor, restrictions against future sale or conveyance, or limits on alterations deemed appropriate by Commission). The Commission encourages the use of easements or other restrictions to ensure the preservation of historic sites.

(7) Financial resources must be available or assured, including an endowment fund where appropriate, or sources of funding must be identified in a comprehensive funding plan to ensure the restoration, interpretation, development, long term operation and preservation of the site.

(8) The property must have the potential for strong supporting partnerships including community support.

(b) Evaluation Process. To evaluate the site against these criteria, Commission will follow a two-step process as follows.

(1) A staff committee will be appointed to conduct a preliminary review of the property with reference to the above criteria. The committee will make a recommendation to the Commission whether to proceed with the second step evaluation.

(2) Staff will obtain and use the following information:

(A) A description of the property, including land, structures and other features.

(B) A preliminary inventory of collections and equipment.

(C) A statement of significance or reference to its designation on the National Register of Historic Places/National Historic Landmark and an evaluation of the site's integrity.

(D) A statement from the current owner indicating a willingness to transfer the real and relevant personal property and the terms and conditions for such a transfer.

(E) Needed and available funding for development costs and continuing operational costs.

(F) Letters of support from interested parties, including an indication of willingness to create an appropriate support group.

(G) A statement identifying how the property would support the educational mission of the Historic Sites program to serve a broad and diverse audience.

(H) A preliminary estimate of the visitation and costs for development and operation of the site.

(3) Upon positive action by the Commission on the above recommendation, the staff will prepare or have prepared a management plan for the site including:

(A) Evaluation of the site, including buildings, support facilities, infrastructure (including roads, trails, utility service/water and sewer systems), landscape features, and collections.

(B) Merits of the proposed site compared to other sites in Texas that embody the same or similar historical or physical characteristics.

(C) Preservation and facility development needs.

(D) Costs and timeline for making the property available to the public.

(E) Any limitation on site development, such as environmental regulations and local restrictions (zoning, land use).

(F) Needed staffing and consultant services for development of the site.

(G) Needed staffing and services for operation of the site, including ongoing costs of preservation operation, and marketing.

(H) Business plan for the site identifying projected audience/annual visitation, sources of funds for all aspects of the program including available community support, potential to generate revenue, and endowment.

(4) This plan will be reviewed by a panel of experts including an independent Texas historian, museum professional, and expert in heritage tourism and their recommendation will be taken into consideration by the Commission to determine whether the property should be accepted.

(5) The decision to accept a site is within the sole discretion of the Commission, including determining whether acceptance of a property that meets all technical criteria is in the best interest of the State.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 6, 2008.

TRD-200802904
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 463-6323

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes new §25.217, relating to Distributed Renewable Generation and an amendment to §25.242, relating to Arrangements Between Qualifying Facilities and Electric Utilities. Project Number 34890 is assigned to this proceeding.

The proposed new §25.217 addresses interconnection, renewable energy credits, and the sale of out-flows for distributed renewable generation. The proposed amendment to §25.242 establishes metering requirements for Distributed Renewable Generation in non-competitive areas of the state in accordance with Public Utility Regulatory Act (PURA) §39.914 and §39.916. The proposed rules are competition rules subject to judicial review as specified in PURA §39.001(e).

David Smithson, Policy Analyst, Competitive Markets Division, has determined that for each year of the first five-year period the proposed sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Smithson has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing them will be compliance with PURA §39.914 and §39.916 and the ability of the owners of distributed renewable generation to sell their outflows to electric utilities and retail electric providers who in turn will be able to benefit from the purchase of this generation in connection with the settlement of energy and capacity purchased and sold in the wholesale market. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the new and amended sections. Therefore, no regulatory flexibility analysis is required. There are some anticipated economic costs to owners of distributed renewable generation, electric utilities, and REP, but the costs are difficult to quantify and are required by PURA §39.914 and §39.916.

Mr. Smithson has also determined that for each year of the first five years the proposed sections are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Tuesday, August 5, 2008,

at 9:30 a.m. The request for a public hearing must be received within 30 days after publication.

In addition to comments on the proposed sections, the commission requests interested persons to file comments in response to the following question:

Should existing qualifying facilities operating under P.U.C. Substantive Rule §25.242(h)(4) in areas of the state in which customer choice has not been introduced be allowed to continue to do so?

Comments on the proposed sections may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. Sixteen copies of comments on the proposed sections are required to be filed pursuant to 16 TAC §22.71(c). Comments should be organized in a manner consistent with the organization of the proposed sections. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed sections. The commission will consider the costs and benefits in deciding whether to adopt the proposed sections. All comments should refer to Project Number 34890.

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.217

The new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2007) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and, in particular, PURA §38.002, which authorizes the commission to adopt standards relating to measurement, quality of service, and metering standards, PURA §39.101(b)(3), which provides the commission the authority to adopt and enforce rules relating to customers' right of access to on-site distributed generation, PURA §39.914, which provides for the sale of out-flows produced by a public school building's solar electric generation panels, and PURA §39.916, which directs the commission to establish standards for distributed renewable generation.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 38.002, 39.101, 39.914, and 39.916.

§25.217. Distributed Renewable Generation.

(a) Application. This section applies to owners of distributed renewable generation, retail electric providers (REPs), the program administrator for the renewable energy credits trading program pursuant to §25.173 of this title (relating to Goal for Renewable Energy), and electric utilities, including transmission and distribution utilities (TDUs), but excludes river authorities that are electric utilities.

(b) Definitions. The following terms when used in this section have the following meanings, unless the context indicates otherwise:

(1) Distributed renewable generation (DRG)--An electric generation facility with a capacity of not more than 2,000 kilowatts provided by a renewable energy technology, as defined by Public Utility Regulatory Act §39.904(d), installed on a retail electric customer's side of the meter.

(2) Distributed renewable generation owner (DRGO)--A person who owns DRG.

(3) Independent school district solar generation (ISD-SG)--Solar electric generation equipment installed on the customer's side of the meter at a building or other facility owned or operated by an independent school district, irrespective of the level of generation capacity.

(4) Independent school district solar generation owner (ISD-SG Owner)--A person who owns ISD-SG.

(5) Interconnection--The physical connection of DRG or ISD-SG to an electric utility distribution system in accordance with this section and §25.211 of this title (relating to Interconnection of On-Site Distributed Generation (DG)), §25.212 of this title (relating to Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation) and §25.213 of this title (relating to Metering for Distributed Renewable Generation).

(6) Out-flow--Energy produced by DRG or ISD-SG and delivered to an electric utility distribution system.

(c) Interconnection.

(1) An electric utility shall permit interconnection of DRG or ISD-SG if:

(A) the DRG to be interconnected has at least five years remaining on a warranty against breakdown or undue degradation;

(B) the rated capacity of the DRG or ISD-SG does not exceed the electric utility's service capacity; and

(C) the DRG or ISD-SG is in compliance with applicable requirements of §25.211 and §25.212 of this title.

(2) An electric utility may disconnect a DRG or ISD-SG pursuant to §25.211(e) of this title.

(3) An electric utility shall not require a DRGO or ISD-SG Owner whose generation capacity is below 2,000 kilowatts and whose DRG or ISD-SG meets the standards established by this section to purchase an amount, type, or classification of liability insurance the DRGO or ISD-SG Owner would not have in the absence of the DRG or ISD-SG.

(4) An existing or prospective DRGO or ISD-SG Owner may request interconnection by submitting an application for interconnection with the electric utility. The application shall be on a form approved by the commission and processed by the electric utility in accordance with §25.211 and §25.212 of this title.

(5) Metering is addressed by §25.213 of this title and, for certain qualifying facilities, by §25.242(h)(4)(C) of this title (relating to Arrangements Between Qualifying Facilities and Electric Utilities).

(d) Renewable Energy Credits (RECs). Any RECs or compliance premiums resulting from the operation of DRG or ISD-SG are the property of the DRGO or ISD-SG Owner unless sold or otherwise transferred by the DRGO or ISD-SG Owner. The REC program administrator shall award the RECs or compliance premiums to the DRGO or ISD-SG Owner pursuant to §25.173 of this title. The purchase of out-flows does not automatically confer any rights of REC ownership on the purchaser.

(e) Registration. DRGOs and ISD-SG Owners acting pursuant to this section are exempt from registration pursuant to §25.109 of this title (relating to Registration of Power Generation Companies and Self-

Generators), but are subject to the certification requirements in §25.173 of this title to be eligible to receive RECs.

(f) Sale of out-flows by an ISD-SG Owner.

(1) In areas of the state in which customer choice has not been introduced, the electric utility serving the load of an ISD-SG Owner shall buy all ISD-SG out-flows at a value consistent with §25.242 of this title.

(2) In areas in which customer choice has been introduced, ISD-SG Owners shall sell out-flows to the REP that serves the facility at which the ISD-SG is located, at a price to which both parties agree.

(3) If a REP's service to an ISD-SG Owner is terminated, any outstanding amounts due to the ISD-SG Owner shall be remitted by the REP no later than 30 days after the REP receives the usage data and any related invoices for non-bypassable charges.

(g) Sale of out-flows by a DRGO.

(1) In areas in which customer choice has not been introduced, the electric utility serving the DRGO's load shall buy all DRG out-flows at a value consistent with the requirements of §25.242 of this title.

(2) In areas in which customer choice has been introduced, DRGOs who choose to sell out-flows shall sell the out-flows to the REP that serves the load of the DRGO at a price to which both parties agree.

(3) If a REP's service to a DRGO is terminated, any outstanding amounts due to the DRGO shall be remitted by the REP no later than 30 days after the REP receives the usage data and any related invoices for non-bypassable charges.

(h) Transition provision. Electric utilities and REPs shall make reasonable efforts to inform existing and potential DRGOs and ISD-SG Owners of their rights and obligations pursuant to this chapter.

(i) For purposes of this section, the DRGO or ISD-SG Owner is assumed to be the retail customer; provided however, if any other person is the DRGO or ISD-SG Owner and purports to act on behalf of the retail customer pursuant to this section or §§25.211, 25.212 or 25.213 of this title, such person must demonstrate contractual authority to do so by letter of agency or otherwise.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 6, 2008.

TRD-200802922
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 936-7223

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SUBCHAPTER J. COSTS, RATES AND TARIFFS
DIVISION 1. RETAIL RATES

16 TAC §25.242

The amended section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2007) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and, in particular, PURA §38.002, which authorizes the commission to adopt standards relating to measurement, quality of service, and metering standards, PURA §39.101(b)(3), which provides the commission the authority to adopt and enforce rules relating to customers' right of access to on-site distributed generation, PURA §39.914, which provides for the sale of out-flows produced by a public school building's solar electric generation panels, and PURA §39.916, which directs the commission to establish standards for distributed renewable generation.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 38.002, 39.101, 39.914, and 39.916.

§25.242. Arrangements Between Qualifying Facilities and Electric Utilities.

(a) (No change.)

(b) Application. This section applies [~~shall apply~~] to all PTB REPs and to all electric utilities, including [~~,~~] transmission and distribution utilities [~~(TDUs), and electric utilities in Texas~~]. The provisions of this section concerning purchase or sale of electricity between an electric utility and a qualifying facility do not apply to a transmission and distribution utility. This section does [~~shall~~] not apply to municipal utilities, river authorities, or electric cooperatives.

(c) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (2) (No change.)

(3) Cost of decremental energy--The cost savings to a utility associated with the utility's ability to back-down some of its units or to avoid firing units, or to avoid purchases of power from another source [~~utility~~] because of purchases of power from qualifying facilities.

(4) - (18) (No change.)

(d) - (e) (No change.)

(f) PTB REP and electric utility obligations.

(1) - (2) (No change.)

(3) Interconnection [~~Obligation to interconnect~~]. Interconnection by a qualifying facility is addressed by [~~The obligation of electric utilities and TDUs to interconnect with qualifying facilities is set forth in~~] Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution) if the interconnection is to a transmission system and by §25.211 of this title (relating to Interconnection of On-site Distributed Generation) if the interconnection is to a distribution system, except if the interconnection is regulated by the Federal Energy Regulatory Commission [~~with respect to qualifying facilities seeking to interconnect with TDUs in the ERCOT, and in the respective electric utility's Open Access Transmission Tariff for electric utilities in non-ERCOT power regions~~].

(4) Transmission to other electric utilities. Transmission service provided by an electric utility in the ERCOT power region to a qualifying facility shall be governed by Subchapter I of this chapter.

(5) (No change.)

(g) (No change.)

(h) Standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(1) - (3) (No change.)

(4) In addition, each electric utility shall offer qualifying facilities using renewable resources with an aggregate design capacity of 50 kilowatts or less the option of interconnecting through a single meter that runs forward and backward.

(A) - (B) (No change.)

(C) This option is not available for applications for interconnection received by the electric utility after December 31, 2008.

(5) - (6) (No change.)

(7) Except for qualifying facilities subject to §25.217 of this title (relating to Distributed Renewable Generation) requirements [~~Requirements~~] for the provision of insurance under this subsection shall be of a type commonly available from insurance carriers in the region of the state where the customer is located and for the classification to which the customer would belong in the absence of the qualifying facility. An enhancement to a standard homeowner's or farm and ranch owner's policy containing adequate liability coverage and having the effect of adding the electric utility as an additional insured or named insured is one means of satisfying the requirements of this paragraph. Such policies shall in each instance be on a form approved or promulgated by the Texas Department of Insurance and issued by a property or casualty insurer licensed to do business in the State of Texas.

(i) - (k) (No change.)

~~[(l) Interconnection costs. The establishment and reimbursement of interconnection costs are set forth in Subchapter I of this chapter with respect to qualifying facilities seeking to interconnect with TDUs in ERCOT, and in the respective electric utility's Open Access Transmission Tariff for electric utilities in non-ERCOT power regions.]~~

(l) [~~(m)~~] System emergencies.

(1) Qualifying facility obligation to provide power during system emergencies. A qualifying facility shall be required to provide energy or capacity to an electric utility during a system emergency only to the extent:

(A) provided by agreement between such qualifying facility and electric utility; or

(B) ordered under the Federal Power Act, §202(c).

(2) Discontinuance of purchases and sales during system emergencies. During any system emergency, an electric utility may discontinue:

(A) purchases from a qualifying facility if such purchases would contribute to such emergency; and

(B) sales to a qualifying facility, provided that such discontinuance is on a nondiscriminatory basis.

(m) [~~(n)~~] Enforcement. A proceeding to resolve a dispute between an electric utility, PTB REP and a qualifying facility arising under this section may be instituted by filing of a petition with the commission. Electric utilities, PTB REPs, and qualifying facilities are encouraged to engage in alternative dispute resolution prior to the filing of a complaint.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 6, 2008.

TRD-200802923

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 936-7223

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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS
SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND

16 TAC §26.403

The Public Utility Commission of Texas (commission) proposes an amendment to §25.403, relating to the Texas High Cost Universal Service Program. The proposed rule addresses reporting requirements for eligible telecommunications providers (ETPs) in accordance with the Final Order adopting the parties' Unanimous Settlement Agreement in P.U.C. Docket Number 34723, *Petition for Review of Monthly Per Line Support Amounts from the Texas High Cost Universal Service Plan and the Small and Rural Incumbent Local Exchange Company Universal Service Plan Pursuant to PURA §56.031.* Project Number 35632 is assigned to this proceeding.

David Smithson, Policy Analyst, Competitive Markets Division, has determined that for each year of the first five-year period the proposed section is in effect, there will be no fiscal implications for state government as a result of enforcing or administering the section.

Mr. Smithson has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be the ability for the public to have greater knowledge of disbursements from the Texas Universal Service Fund (TUSF) to ETPs. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. Therefore, no regulatory flexibility analysis is required. The anticipated economic cost to persons who are required to comply with this rule is less than $5,000 per year.

Mr. Smithson has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Thursday, July 10, 2008, at 9:30 a.m. The request for a public hearing must be received within 10 days after publication.

Comments on the proposed amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 20 days after publication. Sixteen copies of comments to the proposed section are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the proposed sec-

tion. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the proposed section. All comments should refer to Project Number 35632.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §12.001, §14.002 (Vernon 2007 and Supp. 2007) (PURA), which provide the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, PURA §51.001 which gives the commission the authority to make and enforce rules necessary to protect customers consistent with the public interest; PURA §52.051(1)(A), which provides the commission the authority to preserve universal service; PURA §52.002, which authorizes the commission to regulate rates, operations, and services so that the rates are just, fair, and reasonable and the services are adequate and efficient; PURA §56.021(1), §56.021(5) which provide the commission with the authority to assist telecommunications providers in providing basic local telecommunications service at reasonable rates in high cost rural areas and reimburse the providers for providing lifeline service; and, PURA §56.023 which, among other things, requires the commission to assure reasonable rates for basic local telecommunications service and approve procedures for the collection and disbursal of revenue from the universal service fund.

Cross Reference to Statutes: Public Utility Regulatory Act, Texas Utilities Code Annotated §§12.001, 14.002, 51.001, 51.008, 52.051, 52.002, 56.021, 56.023 (Vernon 2007 and Supp. 2007).

§26.403. Texas High Cost Universal Service Plan (THCUSP).

(a) - (e) (No change.)

(f) Reporting requirements. An ETP eligible to receive support pursuant to this section shall report the following information to the commission or the TUSF administrator.

(1) (No change.)

(2) Quarterly reporting requirements. An ETP shall file quarterly reports with the commission showing actual THCUSP disbursements by study area.

(A) The initial report shall cover the period of April 25, 2008, the date of the commission's Final Order in P.U.C. Docket Number 34723, through June 30, 2008.

(B) Subsequent reports shall cover each calendar quarter, beginning July 1, 2008.

(C) Reports for quarters which end prior to this rule's effective date shall be due within 90 days of that date. Reports for subsequent quarters shall be filed no later than 3:00 p.m. on the 20th business day after the end of the reporting period.

(D) Reports shall be filed electronically in the project number assigned by the commission's central records office no later than 3:00 p.m. on the 20th business day after the end of the reporting period.

(3) [~~(2)~~] Annual reporting requirements. An ETP shall report annually to the TUSF administrator that it is qualified to participate in the THCUSP.

(4) [~~(3)~~] Other reporting requirements. An ETP shall report any other information that is required by the commission or the TUSF administrator, including any information necessary to assess contributions to and disbursements from the TUSF.

(g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 6, 2008.

TRD-200802921
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 936-7223

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 7. DEGREE GRANTING COLLEGES AND UNIVERSITIES OTHER THAN TEXAS PUBLIC INSTITUTIONS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §§7.5, 7.8, 7.9

The Texas Higher Education Coordinating Board proposes amendments to §§7.5, 7.8, and 7.9, relating to Degree Granting Colleges and Universities Other Than Texas Public Institutions. New Chapter 7 rules were passed by the Board at the April 24, 2008 meeting. The rules were passed with several non-substantive changes, based on written comments received during the 30 day comment period. Included in the written comments were several suggestions staff considered to be substantive. Thus, Chapter 7 rule changes are being proposed again in order to incorporate those substantive changes. The new language in Chapter 7 concerns governance, distinction of roles, institutional evaluation, alternative certificates of authority, associate of occupational science degrees, and data reporting. Staff conferred with individuals who could be affected by the changes prior to submitting the changes as proposed rules. Specifically, these changes will clarify and expand the governance, distinction of roles and institutional evaluation language in §7.5 (relating to Standards for Operations of Institutions), raise the amount of the surety bond required under §7.8 (relating to Alternative Certificate of Authority), add information regarding the associate of occupational science degree to §7.9 (relating to Certificate of Authority for Career Schools and Colleges).

Dr. Joseph H. Stafford, Assistant Commissioner for Academic Affairs and Research, has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Dr. Stafford has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be a more effective and more appropriate Board response to the requirements and needs of institutions wishing to operate in Texas. There is no

effect on small or micro businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Joseph Stafford, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or Joe.Stafford@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, Chapter 61, Subchapter G, which provides the Coordinating Board with the authority to regulate the awarding or offering of degrees, credit toward degrees, and the use of certain terms.

The amendments affect implementation of Texas Education Code, Subchapter G, §§61.301 - 61.319.

§7.5. Standards for Operation of Institutions.

All institutions that operate within the State of Texas are expected to meet the following standards. Standard (2) relating to Qualifications of Institutional Officers and Standard (3) relating to Policy Making do not apply to branch campuses operating under §7.10 of this chapter (relating to Operation of Branch Campuses, Extension Centers or Other Off-Campus Units, Occasional Courses and Changes in Level). These standards will be enforced through the certificate of authority process or the alternative certificate of authority process. Standards addressing the same principles will be enforced by recognized accrediting agencies. Particular attention will be paid to the institution's commitment to education, responsiveness to recommendations and suggestions for improvement, and, in the case of a renewal of a certificate of authority, record of improvement and progress. These standards represent generally accepted administrative and academic practices and principles of accredited postsecondary institutions in Texas. Such practices and principles are generally set forth by institutional and specialized accrediting bodies and the academic and professional organizations which have established standards for their members' programs.

(1) - (2) (No change.)

(3) Governance. The institution shall have a system of governance that facilitates the accomplishment of the institution's mission and purposes, supports institutional effectiveness and integrity, and protects the interests of its constituents, including students, faculty and staff. If the institution has a governing board consisting of at least three (3) members, and that board focuses on the accomplishment of the institution's mission and purposes, supports institutional effectiveness and integrity, and protects the interests of its constituents, this standard will be considered as met. In the absence of such a governing board, the burden to establish appropriate safeguards within its system of governance and to demonstrate their effectiveness falls upon the institution.

[(3) Policy Making. Governing Board. The institution shall have a governing body consisting of at least three (3) people, focused on promoting the mission of the institution, and shall exercise its authority to ensure that the mission of the institution is carried out. Members of the policy-making body shall represent the interests of all of the constituencies of the institution who are essential to carrying out the mission including the faculty, students, and staff.]

(4) Distinction of Roles. The institution shall define the powers, duties and responsibilities of the governing body and the executive officers. There shall be a clear distinction in the roles and personnel of the chief business officer and the chief academic officer. [There shall be sufficient distinction among the roles and personnel of the policy-making body of the institution, the administration, and faculty to ensure their appropriate separation and independence.]

(5) - (7) (No change.)

(8) Institutional Evaluation.

(A) - (B) (No change.)

(C) For applied associate degree programs relating to occupations where state or national licensure is required, graduates must pass the licensing examination at a rate acceptable to the related licensing agency.

(9) - (23) (No change.)

[(24) Reporting. The institutions shall provide to the Board annually, in a form established by the Board, student records of the type specified in Standard (19) relating to Academic Records.]

(24) [(25)] Learning Outcomes. An institution may deviate from Standard 11 relating to Faculty Qualifications, Standard 12 relating to Faculty Size, Standard 16 relating to Credit for Work Completed Outside a Collegiate Setting, and Standard 17 relating to Learning Resources, if there is an objective system of assessing learning outcomes in place for each part of the curriculum and the institution can demonstrate that appropriate learning outcomes are being achieved.

§7.8. Alternative Certificate of Authority.

In lieu of the standard certification of authority requirements for institutions and their agents in §§7.7, 7.11, and 7.12 of this chapter, an institution may obtain an alternative certificate of authority to issue degrees as provided by this section. Alternative certificates of authority shall be issued by the Commissioner and are temporary, being valid for twelve (12) months, after which a regular certificate of authority shall be required. A site visit shall be conducted by Board staff during the initial twelve month period.

(1) Surety Instrument Requirement.

(A) - (C) (No change.)

(D) Following the initial filing of the surety bond with the Board, the amount of the bond shall be recalculated annually based upon a reasonable estimate of the maximum prepaid, unearned tuition and fees received by the school for such period or term. In no case shall the amount of the bond be less than twenty-five thousand dollars ($25,000) [five thousand dollars ($5,000)].

(E) - (M) (No change.)

(2) - (8) (No change.)

§7.9. Certificate of Authority for Career Schools and Colleges.

(a) - (r) (No change.)

(s) Associate of Occupational Studies (AOS) Degree--Texas has three career schools or colleges awarding the AOS degree: Universal Technical Institute, Southwest Institute of Technology, and Western Technical Institute. The AOS degree shall be awarded in only the following fields: automotive mechanics, diesel mechanics, refrigeration, electronics, and business. Each of the three Institutions may continue to award the AOS degree for those fields listed above and shall be restricted to those fields.

(1) The Board shall not consider new AOS degree programs in other fields from the three career schools or colleges.

(2) The Board shall not consider new AOS degree programs from any other career schools or colleges.

(3) A career school or college authorized to grant the AOS degree shall not represent such degree by using the terms "associate"

or "associate's" without including the words "occupational studies." An institution authorized to grant the AOS degree shall not represent such degree as being the equivalent of the AAS or AAA degrees.

(t) [~~(s)~~] Closure of a Career School or College.

(1) The governing board, owner, or chief executive officer of a career school or college that plans to cease operation shall provide the Board with written notification of intent to close at least ninety (90) days prior to the planned closing date.

(2) If a career school or college closes unexpectedly, the governing board, owner, or chief executive officer of the school shall provide the Board with written notification immediately.

(3) If a career school or college closes or intends to close before all currently enrolled students have completed all requirements for graduation, the institution shall assure the continuity of students' education by entering into a teach-out agreement with another career school or college authorized by the Board to hold a Certificate of Authority according to this section, with a school accredited by a recognized accrediting agency, or with a public two-year college. The agreement shall be in writing, shall be subject to Board approval, and shall contain provisions for student transfer, and shall specify the conditions for completion of degree requirements at the teach-out institution. The agreement shall also contain provisions for awarding degrees.

(4) The Certificate of Authority for a career school or college is automatically withdrawn when the institution closes. The Commissioner may grant to a career school or college that has a Certificate of Authority temporary approval to award a degree(s) in a program the institution does not have approval for in order to facilitate a formal agreement as outlined under this section.

(A) The curriculum and delivery shall be appropriate to accommodate the remaining students.

(B) No new students shall be allowed to enter the transferred degree program unless the new entity seeks and receives permanent approval for the program(s) from the Board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802988
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: July 24, 2008
For further information, please call: (512) 427-6114

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19 TAC §7.15, §7.16

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Higher Education Coordinating Board proposes the repeal of §7.15 and §7.16, concerning Degree Granting Colleges and Universities Other than Texas Public Institutions. Specifically, this repeal will allow Board staff to add a new §7.15 and renumber the repealed sections.

Dr. Joseph H. Stafford, Assistant Commissioner for Academic Affairs and Research, has determined that for each year of the first five years the repeal is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the repeal as proposed.

Dr. Stafford has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of administering the repeal will be negligible. There is no anticipated effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the repeal as proposed. There is no impact on local employment.

Comments on the proposed repeal may be submitted to Joseph Stafford, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or Joe.Stafford@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under the Texas Education Code, Chapter 61, Subchapter G, and Texas Education Code, Chapter 132, which provides the Coordinating Board with the authority to regulate the awarding or offering of degrees, credit toward degrees, and the use of certain terms.

The repeal affects implementation of Texas Education Code, Chapter 61, Subchapter G, §§61.301 - 61.319.

§7.15. Use of Fictitious, Fraudulent, or Substandard Degrees.
§7.16. Administrative Penalties and Injunctions.
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802990
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: July 24, 2008
For further information, please call: (512) 427-6114

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19 TAC §§7.15 - 7.17

The Texas Higher Education Coordinating Board proposes new §§7.15 - 7.17, concerning Degree Granting Colleges and Universities Other than Texas Public Institutions. Specifically, this proposed change will allow Board staff to add a §7.15 and renumber the sections previously numbered §7.15 and §7.16.

Dr. Joseph H. Stafford, Assistant Commissioner for Academic Affairs and Research, has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Dr. Stafford has also determined that for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of administering the sections will be a more effective and more appropriate Board response to the requirements and needs of institutions wishing to operate in Texas. Many of those institutions are small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Joseph Stafford, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or Joe.Stafford@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Education Code, Chapter 61, Subchapter G, and Texas Education Code, Chapter 132, which provides the Coordinating Board with the authority to regulate the awarding or offering of degrees, credit toward degrees, and the use of certain terms.

The new sections affect implementation of Texas Education Code, Chapter 61, Subchapter G, §§61.301 - 61.319.

§7.15. Data Reporting.

The institutions shall provide to the Board annually, in a form established by the Board, student records of the type specified in §7.5(a)(19) of this chapter (relating to Standards for Operation of Institutions).

§7.16. Use of Fictitious, Fraudulent, or Substandard Degrees.

(a) The Board shall disseminate the following information through the Board's Internet website:

(1) the accreditation status or the status regarding authorization or approval under this subchapter, to the extent known by the Board, of each exempt institution operating in the state, each postsecondary educational institution or other person that is regulated under §§7.7 - 7.12 of this chapter or for which a determination is made under §7.12(c) of this chapter (relating to Changes of Ownership and Other Substantive Changes), and any institution offering fraudulent or substandard degrees, including:

(A) the name of each educational institution accredited, authorized, or approved to offer or grant degrees in this state;

(B) the name of each educational institution whose degrees the Board has determined may not be legally used in this state;

(C) the name of each educational institution that the Board has determined to be operating in this state in violation of this chapter; and

(D) any other information considered by the Commissioner to be useful to protect the public from fraudulent, substandard, or fictitious degrees.

(2) the Board shall utilize such usual and customary sources for determining the accreditation status of institutions, such as: guides to international education; the Board's knowledge of legal actions taken against institutions, either by an agency of the state of Texas or agencies of other states or nations; or civil actions against institutions brought by governmental agencies or individuals.

(b) In determining the legitimacy of institutions headquartered or operating outside of Texas, the Board may determine if the state or nation in which the person or institution is headquartered, operates, or holds legal authorization to operate has standards and practices that are as rigorous as those of the Board's. A determination that a particular state or nation's standards or practices are not appropriately rigorous shall be sufficient reason to disapprove the use of the degrees of a person or institution.

§7.17. Administrative Penalties and Injunctions.

(a) A person or institution may not:

(1) Grant, award, or offer to award a degree on behalf of a nonexempt institution unless the institution has been issued a certificate of authority, including an alternative certificate of authority, to grant the degree by the Board;

(2) Represent that credits earned or granted by that person or institution are applicable for credit toward a degree to be granted by some other person or institution except under conditions and in a manner specified under §7.7 of this chapter (relating to Certificate of Authority) and approved by the Board, or represent that credits earned or granted are collegiate in nature, including describing them as "college-level," or at the level of any protected academic term;

(3) Award or offer to award an honorary degree on behalf of a private postsecondary institution subject to the provisions of the subchapter, unless the institution has been awarded a certificate of authority to award such a degree, or solicits another person to seek or accept an honorary degree and, further, unless the degree shall plainly state on its face that it is honorary;

(4) Use a protected term in the official name or title of a nonexempt private postsecondary institution or describe an institution using any of these terms or a term having a similar meaning, except as authorized by the Board, or solicit another person to seek a degree or to earn a credit that is offered by an institution or establishment that is using a term in violation of this section;

(5) Use a protected term in the official name or title of an educational or training establishment or describe an institution using any of these terms or a term having a similar meaning, or solicit another person to seek a degree or to earn a credit that is offered by an institution or establishment that is using a term in violation of this section;

(6) Act as an agent who solicits students for enrollment in a private postsecondary institution subject to the provisions of the subchapter without a certificate of registration, if required by this chapter;

(7) Use or claim to hold a degree that the person knows is a fraudulent or substandard degree or is a fictitious degree:

(A) in a written or oral advertisement or other promotion of a business; or

(B) with the intent to:

(i) obtain employment;

(ii) obtain a license or certificate to practice a trade, profession, or occupation;

(iii) obtain a promotion, compensation or other benefit, or an increase in compensation or other benefit, in employment or in the practice of a trade, profession, or occupation;

(iv) obtain admission to an educational program in this state; or

(v) gain a position in government with authority over another person, regardless of whether the actor receives compensation for the position.

(b) Institutions Located on Federal Land in Texas. An institution that is operating on land in Texas over which the federal government has exclusive jurisdiction shall limit the recruitment of students and advertising of the institution or its programs or courses to the confines of the federal land and to the military or civilian employees and their dependents who work or live on that land. The institution shall not enlist any agent, representative, or institution to recruit or to advertise by any medium, the institution or its programs or courses except on the federal land.

(c) A violation of this subsection may constitute a violation of the Texas Penal Code, §32.52. An offense under subsection (a)(1) - (6) of this section may be a Class A misdemeanor and an offense under subsection (a)(7) of this section may be a Class B misdemeanor.

(d) In the event any institution now or hereafter operating in this state proposes to discontinue its operation, the chief administrative officer, by whatever title designated, of said institution shall cause to be filed with the Board the original or legible true copies of all such academic records of said institution as may be specified by the Commissioner. Such records shall include, without limitation:

(1) such academic information as is customarily required by colleges when considering students for transfer or advanced study; and

(2) the academic records of each former student.

(e) In the event it appears to the Commissioner that any records of an institution that is discontinuing its operations are in danger of being destroyed, secreted, mislaid, or otherwise made unavailable to the Board, the Commissioner may seek, on the Board's behalf, court authority to take possession of such records.

(f) The Board shall maintain or cause to be maintained a permanent file of such records coming into its possession.

(g) If a person or institution violates a provision of this subchapter, the Commissioner may assess an administrative penalty against the person or institution as provided in this section.

(h) The Commissioner shall send written notice by certified mail to the person or institution charged with the violation. The notice shall state the facts on which the penalty is based, the amount of the penalty assessed, and the right of the person or institution to request a hearing.

(i) The Commissioner's assessment shall become final and binding unless, within forty-five (45) days of receipt of the notice of assessment, the person or institution invokes the administrative remedies contained in Chapter 1, Subchapter B of this title (relating to Dispute Resolution).

(j) If the person or institution does not pay the amount of the penalty within thirty (30) days of the date on which the assessment becomes final, the Commissioner may refer the matter to the attorney general for collection of the penalty, plus court costs and attorney fees.

(k) Any person or institution that is neither exempt nor the holder of a certificate of authority, including an alternative certificate of authority, to grant degrees, shall be assessed an administrative penalty of not less than $1,000 or more than $5,000 for, either individually or through an agent or representative:

(1) conferring or offering to confer a degree;

(2) awarding or offering to award credits purported to be applicable toward a degree to be awarded by another person or institution (except under conditions and in a manner specified and approved by the Board);

(3) representing that any credits offered are collegiate in nature subject to the provisions of this subchapter;

(4) each degree conferred without authority, and each person enrolled in a course or courses at the institution whose decision to enroll was influenced by the misrepresentations, constitutes a separate offense.

(l) Any person or institution that violates subsection (a)(4) or (5) of this section shall be assessed an administrative penalty of not less than $1,000 or more than $3,000.

(m) Any agent who solicits students for enrollment in an institution subject to the provisions of the subchapter without a certificate of registration shall be assessed an administrative penalty of not less than $500 or more than $1,000. Each student solicited without authority constitutes a separate offense.

(n) Any operations which are found to be in violation of the law shall be terminated.

(o) The Commissioner may report possible violations of this subchapter to the attorney general. The attorney general, after investigation and consultation with the Board, shall bring suit to enjoin further violations.

(p) An action for an injunction under this section shall be brought in a district court in Travis County.

(q) A person who violates this subchapter or a rule adopted under this subchapter is liable for a civil penalty in addition to any injunctive relief or any other remedy allowed by law. A civil penalty may not exceed $1,000 a day for each violation.

(r) The attorney general, at the request of the Board, shall bring a civil action to collect a civil penalty under this section.

(s) A person who violates this subchapter commits a false, misleading, or deceptive act or practice within the meaning of the Texas Business and Commerce Code, §17.46.

(t) A public or private right or remedy under the Texas Business and Commerce Code, Chapter 17, may be used to enforce this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802989
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: July 24, 2008
For further information, please call: (512) 427-6114

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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 102. EDUCATIONAL PROGRAMS SUBCHAPTER EE. COMMISSIONER'S RULES CONCERNING PILOT PROGRAMS

19 TAC §102.1056

The Texas Education Agency (TEA) proposes new §102.1056, concerning the Dropout Recovery Pilot Program. The proposed new rule would establish a grant program for dropout recovery that meets the requirements of the Strategic Plan of the High School Completion and Success Initiative Council authorized in the Texas Education Code (TEC), §39.361(c).

The TEC, §39.357(b), requires the commissioner to establish rules as necessary to administer the strategic plan adopted by the High School Completion and Success Initiative Council (Council). The TEC, §39.361(c), authorizes the commissioner to establish grant programs to meet the goals of the Council's strategic plan. In addition, the TEC, §39.366, authorizes the commissioner to adopt rules as necessary to administer the High School Completion and Success Initiative.

The strategic plan was adopted by the Council on March 11, 2008. The Council's goals are to: reduce high school dropout rates, improve postsecondary success, and close gaps in achievement among student socio-economic, racial, and ethnic groups. Under these goals, the Council specified objectives and corresponding action plans. In action plan 1.3.1, the strategic plan provides for targeted intervention programs to serve students who have academic deficiencies, are at-risk of dropping out of school, or have already dropped out of school through traditional and alternative education settings. The strategic plan further specifies the inclusion of a dropout recovery program for which a variety of service providers are eligible such as school districts, open-enrollment charter schools, regional education service centers, institutions of higher education, and nonprofit organizations.

The proposed new 19 TAC §102.1056, Dropout Recovery Pilot Program, would establish a grant program to recover students who have dropped out of Texas public schools and enable them to earn a high school diploma or demonstrate college readiness by obtaining a General Educational Development (GED) credential and by passing the Texas Success Initiative (TSI) and a college course or its equivalent. The proposed grant program will be competitively funded under a Request for Application (RFA) process and includes various grant conditions. The proposed new rule would establish and address: definitions for applicable words and terms; criteria for eligible entities; specifications for application and notification; conditions of program operation; details about funding, including allowable expenditures and expenditures that are not allowed; information about evaluation and revocation; requirements for access to records; and provisions for a technical advisory panel.

Approved pilot program participants would be required to adhere to all procedural, reporting, and evaluation requirements. Entities awarded funding would be required to maintain grant application documentation and program-related paperwork.

Barbara Knaggs, Associate Commissioner for State Initiatives, has determined that for the first five-year period the new section is in effect there will be no additional fiscal implications for state or local government as a result of enforcing or administering the new section. The proposal would establish in rule procedures for implementation of the Dropout Recovery Pilot Program.

Ms. Knaggs has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be that eligible students will benefit through expanded access to programs in which they may earn a high school diploma or demonstrate college readiness. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins June 20, 2008, and ends July 21, 2008. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028.

A public hearing will be held to receive public comments on the proposed rule. The hearing has been scheduled for Wednesday, June 25, 2008, at 9:00 a.m. in the Capitol Extension Auditorium, 1100 North Congress Avenue, Austin, Texas. Questions about the scheduled public hearing should be directed to the TEA Division of State Initiatives at (512) 936-6060.

The new section is proposed under the Texas Education Code (TEC), §39.357, as added by House Bill 2237, 80th Texas Legislature, 2007, which requires the commissioner to establish rules as necessary to administer the strategic plan adopted by the High School Completion and Success Initiative Council (Council), and TEC, §39.366, which authorizes the commissioner to adopt rules as necessary to administer the High School Completion and Success Initiative. The TEC, §39.361(c), authorizes the commissioner to establish grant programs to meet the goals of the Council's strategic plan.

The new section implements the TEC, §§39.357, 39.365, 39.366, and 39.361.

§102.1056. Dropout Recovery Pilot Program.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Advanced technical credit--Credit earned by a high school student who meets established guidelines for successful completion of an articulated content-enhanced technical course included on the list of courses in the Statewide Articulated Crosswalk established by the Advanced Technical Credit Program, a program accepted by participating colleges and universities for students interested in preparing for college and a technical career that requires postsecondary education.

(2) Dropout Recovery Pilot Program--A pilot program established and implemented by the Texas Education Agency (TEA) in accordance with the Texas Education Code (TEC), Chapter 39, Subchapter L. The pilot program is to provide eligible entities with financial grants to identify and recruit students who have dropped out of Texas public schools and provide them services designed to enable them to earn a high school diploma or demonstrate college readiness.

(3) Eligible student--For the purposes of this section, an eligible student is defined as a student who is 25 years of age or less and who:

(A) was assigned by a Texas public secondary school a leaver code in the Public Education Information Management System (PEIMS) that corresponds to the definition of a dropout for that school year in which the student withdrew;

(B) was enrolled in a Texas public secondary school and during the last regular school year in which the student was enrolled the student was not in attendance for at least 30 consecutive school days. Between this period of non-attendance and enrollment in the Dropout Recovery Pilot Program, the student may not have been enrolled in any Texas public secondary school, private school, or home school; or

(C) has a notarized affidavit from the student's parent or legal guardian stating that the student has dropped out of a Texas public secondary school, as defined in subparagraph (A) or (B) of this paragraph, and is not currently enrolled in a Texas public secondary school, private school, or home school.

(4) Institution of higher education (IHE)--An institution of higher education is any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education as defined in the TEC, §61.003.

(5) Nonprofit organization--An organization that meets the requirements of the United States Code, Title 26, Subtitle A, Chapter 1, Subchapter F, Part I, Section 501(a).

(6) P-16 Individualized graduation plan (P-16 IGP)--A document with a prekindergarten through postsecondary focus, detailing a student's plans regarding courses to be taken during high school in order to succeed in entry-level courses offered at IHEs. A P-16 IGP shall include the following:

(A) the most recent assessment scores and strategies to improve these scores if they fall below the student's appropriate grade level;

(B) the educational goals of the student;

(C) any diagnostic information, appropriate monitoring and intervention and other evaluation strategies;

(D) a description of participation of the student's parent(s) or guardian, including consideration of their educational expectations for the student; and

(E) a description of innovative methods to be used to promote the student's advancement and preparation to enter higher education prepared to succeed in entry-level courses.

(7) School district--For the purposes of this section, the definition of school district includes an open-enrollment charter school.

(8) Shared service arrangement (SSA)--A shared service arrangement is an agreement between two or more eligible applicants (school districts, nonprofit organizations that have demonstrated the ability and capacity to provide educational programs to students in any grade from kindergarten through Grade 12, education service centers, county departments of education) for provision of program services. A nonprofit organization that is not an eligible applicant may participate in the shared service arrangement, but may not serve as the fiscal agent.

(9) Texas Success Initiative (TSI)--An initiative of the Texas Higher Education Coordinating Board established under §4.51 of this title (relating to Purpose).

(b) Eligibility.

(1) The following entities, located in specific regions of the state as established annually in the grant application, are eligible to apply for and receive grant funds under the Dropout Recovery Pilot Program:

(A) school districts;

(B) IHEs;

(C) county departments of education;

(D) nonprofit organizations that have demonstrated the ability and capacity to provide educational programs to students in any grade from kindergarten through Grade 12; and

(E) education service centers established under the TEC, §8.001.

(2) Eligible applicants listed in paragraph (1) of this subsection and other nonprofit organizations may enter into an SSA in order to apply for grant funds. An SSA is limited to no more than ten entities.

(3) The applicant awarded the grant and acting as the fiscal agent for the program must comply with the following conditions of eligibility.

(A) The applicant must have been operating as one of the eligible entities listed in paragraph (1) of this subsection for at least three years prior to the time of grant application.

(B) If an applicant is operating an education program that issues high school diplomas, the applicant must either have:

(i) been granted a charter from the State Board of Education or the local district in which it resides, or a home-rule district in accordance with the TEC, §§12.011, 12.052, and 12.101; or

(ii) earned accreditation through:

(I) the TEA, in accordance with the TEC, §39.071, and §97.1053 of this title (relating to Purpose);

(II) an accrediting entity, operating as a member of the Texas Private School Accreditation Commission; or

(III) another accrediting entity approved by the commissioner of education.

(C) The applicant must be determined by the TEA to be financially stable. The TEA will make this determination using information required of the applicant serving as the fiscal agent and submitted in the grant application, including information provided in the following reports:

(i) an audit report, conducted within the last two years, including a statement of financial position, statement of activities (income), statement of cash flows, note disclosures, and the independent auditor's opinion (standard report);

(ii) if subject to the Single Audit Act of 1996, as amended, the applicant must also include reports in accordance with Government Auditing Standards, as promulgated by the United States Government Accountability Office and Office of Management and Budget Circular A-133; or

(iii) a compilation of financial statements prepared by a certified public accountant, including a report on compiled financial statements, a statement of financial position, statement of activities (income), and statement of cash flow.

(D) All nonprofit organizations, including open-enrollment charter schools but excluding school districts, must submit current proof of nonprofit status. An applicant may show current nonprofit status by any of the following means:

(i) a copy of a letter from the Internal Revenue Service recognizing that contributions to the organization are tax deductible under the Internal Revenue Code, Section 501(c)(3);

(ii) a statement from a state taxing body or the state attorney general certifying that the organization is a nonprofit organization operating within the state and that no part of its net earnings may lawfully benefit any private shareholder or individual;

(iii) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or

(iv) any item described in this subparagraph if that item applies to a state or national parent organization, together with a statement by the parent organization that it is a local nonprofit affiliate.

(c) Application.

(1) An eligible applicant must submit an application in accordance with procedures determined by the commissioner and detailed in the Request for Application (RFA). The application must include a P-16 Strategic Plan that indicates how implementation of this program will address deficiencies in the grantee's overall P-16 strategy.

(2) Each eligible applicant must meet all deadlines, requirements, and guidelines outlined in the RFA.

(d) Notification. The TEA will notify each applicant in writing of selection or non-selection for funding under the Dropout Recovery Pilot Program. In the case of an application selected for funding, notification to the applicant will include the contractual conditions the applicant agrees to accept as a condition of grant award.

(e) Conditions of pilot program operation. Each grantee operating an approved Dropout Recovery Pilot Program must operate the program in accordance with the requirements outlined in the RFA and must:

(1) conduct an assessment, in accordance with specifications detailed in subsection (f)(4)(B)(ii) - (iii) of this section, for each participating student to determine services needed and create a P-16 IGP for each student based on the assessment;

(2) employ as faculty and administrators persons with baccalaureate or advanced degrees;

(3) meet the following requirement regarding employee criminal history checks:

(A) if a grantee is a school district, the grantee must be in compliance with the TEC, §22.085(f), to remain eligible for the program; or

(B) if a grantee is not a school district, the grantee must obtain criminal history record information as defined in §153.1101(2) of this title (relating to Definitions) on each employee, and an officer of the organization with signature authority must certify that no employee of the organization or person contracted with the organization who has contact with students in the program has been convicted of:

(i) a felony offense under Title 5, Texas Penal Code;

(ii) an offense or conviction of which a defendant is required to register as a sex offender under Code of Criminal Procedure, Chapter 62; and

(iii) an offense under the laws of another state or federal law that is equivalent to an offense under clause (i) or (ii) of this subparagraph; and

(4) ensure that the grant activities funded under the Dropout Recovery Pilot program are non-sectarian.

(f) Funding. Grantees are eligible to receive the following funding.

(1) Base funding. A grantee will receive a base amount of funding, to be determined during the grant application phase, in the first year of operation of the program for the purposes of planning, establishing an appropriate infrastructure to implement the program, and implementing the program for eligible students.

(2) Performance funding. In addition to the base funding, a grantee is eligible to receive performance funding up to a total of $2,000 in the program year (which includes no more than $1,000 in interim benchmark payments and $1,000 in a completion payment) for each eligible student participating in the program based upon the student's academic performance.

(A) Interim benchmark payments. A payment of $250 for any, not to exceed four, of the following benchmarks achieved by an eligible student participating in the program who:

(i) earned the required course credits necessary to advance to the next grade level;

(ii) earned high school graduation credit for a dual credit course that was established through an articulation agreement with an IHE or a private or an independent IHE, as defined in the TEC, §61.003(15);

(iii) earned college credit for a course that is within an IHE's core curriculum, in accordance with §4.28 of this title (relating to Core Curriculum), or an equivalent course offered by a private or an independent IHE, as defined in the TEC, §61.003(15);

(iv) earned a passing score on all subject areas of the statewide student assessment program for a grade level not including the Grade 11 exit-level statewide assessments;

(v) earned a score of three or higher on a College Board advanced placement examination;

(vi) earned a score on the Preliminary SAT®/National Merit Scholarship Qualifying Test or the PLAN® that predicts evidence of readiness, as determined by College Board or ACT®, for placement in College Board advanced placement, International Baccalaureate, or dual credit courses; or

(vii) other benchmarks as approved by the commissioner.

(B) Completion payments. A payment of $1,000 for each participating student who:

(i) earns a high school diploma; or

(ii) demonstrates college readiness by:

(I) achieving a passing score on a TSI testing instrument or earning a TSI exemption based on the score received for an alternative test such as SAT® or ACT®; and

(II) obtaining a General Educational Development (GED) credential; and

(III) earning either:

(-a-) college credit for a course that is within an IHE's approved core curriculum, in accordance with §4.28 of this title, or an equivalent course offered by a private or an independent IHE, as defined in the TEC, §61.003(15); or

(-b-) advanced technical credit.

(3) Other funding for school districts. School districts operating approved Dropout Recovery Pilot Programs may receive Foundation School Program funds for eligible participating students, in accordance with the TEC, §42.003.

(4) Other funding for eligible IHEs, nonprofit organizations, county departments of education, and education service centers. Programs operated by eligible IHEs, nonprofit organizations, county departments of education, and education service centers may receive a payment in an amount not greater than $4,000 ($2,000 per semester) for each eligible student participating in the program each year.

(A) Semester payments of up to $2,000 for each eligible student will be made at the end of each semester contingent upon the eligible student achieving academic progress on the same assessment instrument administered upon initial enrollment in the program and at the end of each subsequent semester.

(B) Programs must adhere to the following in choosing an assessment instrument to assess academic progress as described in subparagraph (A) of this paragraph:

(i) the same assessment instrument must be administered to the participating student for initial testing and at the end of each semester;

(ii) the assessment instrument must be a standardized test or a performance assessment with standardized scoring protocols; and

(iii) the assessment instrument and the performance standards for measuring academic progress must be identified in the grant application and approved by the commissioner prior to grant award.

(g) Allowable expenditures. Allowable expenditures with grant funds include, but are not limited to, the following:

(1) textbooks and other instructional materials;

(2) recruiting and promotional materials;

(3) personnel costs, including salaries, benefits, stipends, and incentives;

(4) tutoring services;

(5) test fees;

(6) social services;

(7) transportation;

(8) educational software;

(9) incentive programs for students;

(10) technology;

(11) equipment costs; and

(12) costs associated with distance learning or participation in virtual schools.

(h) Disallowed expenditures. The following expenditures, including but not limited to the following, may not be made with grant funds:

(1) construction;

(2) purchase of buildings;

(3) debt service (including lease-purchase agreements);

(4) expenditures related to religious instruction;

(5) expenditures related to students who are not eligible for the program; or

(6) indirect costs.

(i) Evaluation. Each grantee operating an approved Dropout Recovery Pilot Program must comply with evaluation procedures established by the commissioner as detailed in the RFA.

(j) Subsequent funding. To receive any subsequent funding for the Dropout Recovery Pilot Program, grantees must reapply for funding on an annual basis. In order to remain eligible for any subsequent funding, the grantee must have met all applicable performance standards included in the prior year's grant agreement and submit a new application annually.

(k) Revocation.

(1) The commissioner may revoke the grant award for the Dropout Recovery Pilot Program based on the following factors:

(A) noncompliance with application assurances and/or the provisions of this section;

(B) lack of program success as evidenced by progress reports and program data;

(C) failure to participate in data collection and audits;

(D) failure to meet performance standards specified in the application; or

(E) failure to provide accurate, timely, and complete information as required by the TEA to evaluate the effectiveness of the Dropout Recovery Pilot Program.

(2) A decision by the commissioner to revoke the grant award of a Dropout Recovery Pilot Program is final and may not be appealed.

(l) Access to records. For grantees that are nongovernmental bodies, access must be granted to all records, including those of the controlling or parent entity, involving transactions and payments of program funds.

(m) Technical assistance. The commissioner may create a technical advisory panel made up of experts and practitioners from areas with experience and expertise in dropout recovery to advise the TEA regarding review criteria and implementation issues. The technical advisory panel may provide technical assistance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802986
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 475-1497

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SUBCHAPTER FF. COMMISSIONER'S RULES CONCERNING EDUCATOR AWARD PROGRAMS

19 TAC §102.1071

The Texas Education Agency (TEA) proposes an amendment to §102.1071, concerning the Texas Educator Excellence Grant. The section establishes procedures for the administration of the awards for the student achievement program. The proposed amendment would update the procedures and requirements for the administration of the program.

House Bill 1, 79th Texas Legislature, Third Called Session, added the Texas Education Code (TEC), Chapter 21, Subchapter N, 2006, establishing a program whereby classroom teachers and other campus personnel may receive incentive awards from an eligible campus through the student achievement program. The legislation required the commissioner to establish the grant award program and adopt rules for developing a campus incentive plan and the awarding of funds. In response to this legislation, 19 TAC §102.1071, Governor's Educator Excellence Award Program--Texas Educator Excellence Grant, was adopted to be effective January 9, 2007.

Section 102.1071 implements the TEC, Chapter 21, Subchapter N, by establishing provisions that prescribe the procedure that a school district and open-enrollment charter school must follow to apply for and receive funding on behalf of an eligible campus for the grant program under this section. The rule also addresses the determination of which campuses are eligible

to receive funding, establishes requirements for campus incentive plans, and provides additional specifications regarding the manner in which incentive payments are allocated to classroom teachers and other eligible campus employees.

The proposed amendment would add definitions for applicable words and terms, incorporate additional requirements for campus incentive plans, revise specifications for incentive payments to classroom teachers, and update details regarding distribution of program funds. In addition, the section title would be updated from "Governor's Educator Excellence Award Program--Texas Educator Excellence Grant" to "Texas Educator Excellence Grant."

The proposed amendment would provide additional requirements and procedures for applying for the Texas Educator Excellence Grant. Grantees must agree to submit all information, application materials, and reports required by the TEA. The proposed amendment does not require any additional locally maintained requirements not already in place from initial adoption of 19 TAC §102.1071.

Barbara Knaggs, Associate Commissioner for State Initiatives, has determined that for the first five-year period the amendment is in effect there will be no additional fiscal implications for state or local government as a result of enforcing or administering the amendment.

Ms. Knaggs has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be the positive impact the program will continue to have on classroom teaching by rewarding classroom teachers and other school personnel for success in improving and having a positive impact on student performance and for collaborating with faculty and staff to contribute to improving overall student performance on the campus. Another benefit will be increasingly improved education for the school children of Texas that prepares them for success in the future thereby creating an improved and more highly educated and prepared workforce. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins June 20, 2008, and ends July 21, 2008. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on June 20, 2008.

The amendment is proposed under the Texas Education Code, §21.652 and §21.658, which authorize the commissioner to, by rule, establish procedures and adopt guidelines for the administration of the awards for the student achievement program.

The amendment implements the Texas Education Code, §§21.652 - 21.658.

§102.1071. [~~Governor's Educator Excellence Award Program--~~] Texas Educator Excellence Grant.

(a) Establishment of program.

(1) In accordance with the Texas Education Code (TEC), §21.652, the [~~Governor's Educator Excellence Award Program--~~] Texas Educator Excellence Grant (TEEG) is established as an annual grant program under which a school district or open-enrollment charter school may receive a grant on behalf of an eligible campus as an award for student achievement. Provisions regarding implementation of the program are described in this section.

(2) Funds from this program will be distributed to a school district or open-enrollment charter school, on behalf of an eligible campus, that submitted an approved campus incentive plan developed in accordance with the TEC, §21.654, and subsection (f) [~~(c)~~] of this section.

(b) Definitions.

(1) Campus incentive plan--A plan developed in accordance with the TEC, §21.654, and subsection (f) of this section.

(2) Campus staff--For the purpose of this section, the definition of campus staff includes all school district employees regularly assigned to the campus.

(3) Classroom teacher--As defined in the TEC, §5.001(2).

(4) Contingency plan--A plan that outlines alternative strategies to distribute any remaining unawarded Part I and/or Part II grant funds after the campus incentive plan has been implemented.

(5) Objective, quantifiable measures--Sources used to evaluate student achievement or other non-academic, campus-level indicators of performance that can be measured, have a standardized definition, and are reported in the same way for every campus/district and in the same way from year to year.

(6) Part I funds--Grant funds that make up no less than 75% of the grant allocation and must be used to award eligible classroom teachers in accordance with the TEC, §21.656. Unexpended, unawarded Part I funds may not be carried over to subsequent years without commissioner of education approval.

(7) Part II funds--Grant funds that make up no more than 25% of the grant allocation and must be used on awards to campus teachers and staff and allowable activities in accordance with the TEC, §21.657. No more than 5.0% of the total grant allocation may be allocated for allowable direct administrative costs. These costs must be charged/deducted to Part II funds.

(8) Performance measures--Performance targets/goals established during the grant implementation year for campus teachers and staff that clearly state desired outcomes, outputs, or events and the timeframe in which they are to be met.

(9) Public viewing--For public viewing, content must be provided in a format that is understandable and disseminated through a mode easily accessible to anyone requesting the information.

(10) School district--For the purpose of this section, the definition of school district includes an open-enrollment charter school.

(c) [~~(b)~~] Campus eligibility.

(1) Campus eligibility shall be determined in accordance with the TEC, §21.653.

(2) Each year of the grant, a new list of eligible campuses will be published by the Texas Education Agency (TEA). Academically

Unacceptable (AU) campuses are not eligible [~~will not be included on this list~~].

(3) Campuses may be eligible to receive this grant multiple times.

(d) Application. A school district must apply through the request for application process on behalf of an eligible campus to participate in the TEEG program. Each eligible applicant must meet all deadlines, requirements, and assurances specified in the application.

(e) Notification. The TEA will notify each applicant in writing of its approval or non-approval to receive a notice of grant award (NOGA) under the TEEG program.

(f) [~~(c)~~] Campus incentive plan.

(1) A campus incentive plan must:

(A) include:

(i) a Part I plan to distribute incentive payments to classroom teachers in accordance with the TEC, §21.656;

(ii) a Part II plan to distribute the remaining other program funds in accordance with the TEC, §21.657; and

(iii) Part I and Part II contingency plans;

(B) be:

(i) developed and approved by each campus-level decision-making body;

(ii) approved by a campuswide staff vote, by at least a simple majority;

(iii) approved by its district-level committee; and

(iv) presented to and, if applicable, approved by the local school board; and

(C) be made available for public viewing within a reasonable time period after each of the following:

(i) submission to the TEA by a school district on behalf of an eligible campus along with the grant application; and

(ii) the school district's receipt of the NOGA from the TEA if any program and/or budget amendments are made after submission.

[~~(1) As delineated in the TEC, §21.654, a campus incentive plan must be:~~]

[~~(A) developed by each campus-level decision-making body;~~]

[~~(B) approved by its district-level committee; and~~]

[~~(C) submitted by a district on behalf of an eligible campus.~~]

(2) The campus-level decision-making body developing the plan should be composed of individuals representing a diverse and broad mix of teachers, including representatives [~~representation~~] from different grade levels and subject areas and with different years of teaching experience at the campus and/or school district.

(A) Participation on the campus-level decision-making body should be voluntary.

(B) The selection process for identifying the members of the campus-level decision-making body must be described in the request for application submitted to the TEA.

(C) No more than half of the members of the campus-level decision-making body should be assigned by campus administrators and/or central office personnel.

(3) The district-level decision-making committee may require minimum criteria in campus incentive plans. These criteria should be aligned with established districtwide goals, and campus plans must reflect these goals in distributing grant funds.

(4) [~~(3)~~] The school district may choose to provide guidance to campuses in the creation of plans.

(5) [~~(4)~~] The TEA may consider for approval only a campus incentive plan developed, approved, and submitted in accordance with the TEC, §21.654, and this section.

(6) [~~(5)~~] A school district must act pursuant to its local school board policy for submitting a campus incentive plan and grant application to the TEA. A local school board may either vote to submit a grant application or designate the superintendent to submit the application on the board's behalf. A superintendent may act on previously delegated authority regarding the submission of the grant application(s) [~~grant(s)~~].

(7) [~~(6)~~] A campus that has implemented an approved incentive plan may choose to renew its plan, should it be eligible for funding in subsequent years, for up to three years after the first year of implementation.

(8) [~~(7)~~] A decision by a local school board to approve and/or submit its incentive plan and/or grant application is not appealable to the commissioner of education. A local grievance decision as to whether an award was made in compliance with the approved plan is not appealable to the commissioner of education. Local school districts must follow locally established inquiry and appeal processes for local grievances to campus incentive plan processes, development, and implementation. These processes must be in agreement with local school district and school board policies.

(g) [~~(d)~~] Amount of program award.

(1) In accordance with the TEC, §21.655, each eligible campus whose campus incentive plan is approved by the TEA is entitled to a grant award in an amount determined by the commissioner of education.

(2) Award amounts may vary from one year to the next.

(h) [~~(e)~~] Incentive payments to classroom teachers.

(1) An eligible campus incentive plan must allocate [~~distribute~~] a specified percentage (no less than 75%) of its program grant award to classroom teachers in accordance with the TEC, §21.656.

(2) All funds must be used to provide incentives not previously funded with state, local, or federal funds.

[~~(3) Incentives awarded under this subsection may be used only for classroom teachers. For the purposes of this subsection, the term "classroom teacher" is defined as "an educator who is employed by a school district and who, not less than an average of four hours each day, teaches in an academic instructional setting or a career and technology instructional setting." For the purposes of this subsection, the definition of the term "classroom teacher" does not include a teacher's aide or a full-time administrator.~~]

[~~(A) Necessary functions related to the classroom teacher's instructional assignment, such as instructional planning and transition between instructional periods, should be applied to creditable classroom time. Time spent on duties unrelated to instruction should not be credited toward classroom time.~~]

[(B) For a school district, a classroom teacher, as defined in this subsection, must hold an appropriate certificate issued by the State Board for Educator Certification and must meet the specifications regarding instructional duties defined in this subsection. For a charter school, a classroom teacher is not required to be certified, but must meet the qualifications of the employing charter school and the specifications regarding instructional duties defined in this subsection.]

(3) [(4)] As specified in the TEC, §21.656, and further delineated in this subsection, an eligible campus receiving program funds may distribute an incentive payment only to a classroom teacher who meets the performance measure requirements as specified in their approved campus incentive plan as allowed by the TEC, §21.656(b). [:]

[(A) demonstrates success in improving student achievement. Measures determining a classroom teacher's success in improving student performance must allow for program administrators to evaluate teacher impact on student achievement; and]

[(B) successfully collaborates with faculty and staff to contribute to improving overall student performance on the campus. The collaboration must be measured using campus-based activities. Participation in tutoring sessions or personal-planning periods is not a sufficient measure of collaboration.]

(4) [(5)] A campus or district may choose to exclude a teacher from receiving an incentive award as specified in this paragraph. In such an instance, the campus incentive plan must reflect the campus/district policies with regard to such a teacher at the program start date. These decisions must be clearly stated in the application and approved through the application approval process. A decision to exclude a certain teacher from receiving an award cannot be appealed to the commissioner of education. A teacher may be excluded who: [award a teacher who has transferred or retired or who works part-time on a campus eligible to receive grant funds. In such an instance, the campus incentive plan must reflect the campus/district policies with regard to such a teacher at the program start date.]

(A) is new to the campus;

(B) works part-time on an eligible campus; or

(C) meets another locally determined practice, except a teacher who retires or is transferred involuntarily from the eligible campus during or following the grant implementation year.

(5) [(6)] Each individual incentive award should be no less than $3,000 and no more than $10,000 per teacher to the extent practicable. If teacher awards are less than $3,000 or more than $10,000, the campus incentive plan must: [include the reasons that a total possible individual award amount between $3,000 and $10,000 per teacher was not practicable. A local school board decision as to whether award amounts between $3,000 and $10,000 per teacher are practicable is final and may not be appealed to the commissioner of education.]

(A) include the reasons that a total possible individual award amount between $3,000 and $10,000 per teacher was not practicable, including decisions to set:

(i) maximum incentive amounts awarded from Part I and/or Part II grant funds; and

(ii) caps on additional incentive amounts redistributed from unawarded Part I and/or Part II grant funds, including the methodology used to determine the redistributed amount; and

(B) provide the date the local school board approved the award amount decisions. A local school board decision on award amounts per teacher is final and may not be appealed to the commissioner of education.

(i) [(f)] Distribution of other program funds. An eligible campus receiving program funds can [must] use a specified percentage (no more than 25%) of its program grant award for some or all of the provisions specified in the TEC, §21.657(a), when distributing incentive payments, including the requirements specified in [paragraphs (1) - (3) of] this subsection when applicable. Program funds distributed under the TEC, §21.657, may also be used to increase the total amount of funds to provide awards to classroom teachers under the TEC, §21.656. Funds used for any of these allowable activities must be used to supplement not supplant. Stipends paid for teachers who hold a postgraduate degree, as specified in the TEC, §21.657(a)(12), must be for a postgraduate degree that will improve instructional abilities, excluding education administration, mid-management certification, and superintendency certification.

[(1) Stipends paid for teachers to participate in after-school or Saturday programs, as specified in the TEC, §21.657(a)(10), must be used to supplement not supplant.]

[(2) Stipends paid for teachers who hold a postgraduate degree, as specified in the TEC, §21.657(a)(12), must be for a postgraduate degree that will improve instructional abilities, excluding education administration, mid-management certification, and superintendency certification. These stipends must be used to supplement not supplant.]

[(3) Extending funding to feeder campuses, as outlined in the TEC, §21.657(a)(13), must be used to implement an activity described in the TEC, §21.657. The student population of the feeder campus shall not be used to determine campus award eligibility or the award amount.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER C. DISCIPLINARY GUIDELINES

22 TAC §§281.62 - 281.65

The Texas State Board of Pharmacy proposes amendments to §281.62, concerning Aggravating and Mitigating Factors, §281.63, concerning Considerations for Criminal Offenses, §281.64, concerning Sanctions for Criminal Offenses, and §281.65, concerning Schedule of Administrative Penalties. The proposed amendments, if adopted, clarify disciplinary guidelines to reflect that the Board has given careful consideration to the

guidelines and intends the guidelines to reflect the regulatory polices and goals of the Board to protect the public health and safety.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will ensure that the disciplinary guidelines reflect the regulatory polices of the Board protect the public health and safety. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with the sections.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., July 21, 2008.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.62. Aggravating and Mitigating Factors.

The following factors may be considered in determining the disciplinary sanctions imposed by the board if the factors are applicable to the factual situation alleged. The factors are not applicable in situations involving criminal actions (in which case §281.63 of this title (relating to Considerations for Criminal Offenses) applies).

(1) [~~(a)~~] Aggravation. The following may be considered as aggravating factors so as to merit more severe or more restrictive action by the board:

(A) [~~(1)~~] patient harm and the severity of patient harm;

(B) [~~(2)~~] economic harm to any individual, entity, or the environment, and the severity of such harm;

(C) [~~(3)~~] increased potential for harm to the public;

(D) [~~(4)~~] attempted concealment of the conduct which serves as a basis for disciplinary action under the Act;

(E) [~~(5)~~] premeditated conduct which serves as a basis for disciplinary action under the Act;

(F) [~~(6)~~] intentional conduct which serves as a basis for disciplinary action under the Act;

(G) [~~(7)~~] motive for conduct which serves as a basis for disciplinary action under the Act;

(H) [~~(8)~~] prior conduct of a similar or related nature;

(I) [~~(9)~~] disciplinary actions taken by any regulatory agency of the federal government or any state;

(J) [~~(10)~~] prior written warnings or written admonishments from any government agency or official regarding statutes or regulations pertaining to the conduct which serves as a basis for disciplinary action under the Act;

(K) [~~(11)~~] violation of a board order;

(L) [~~(12)~~] failure to implement remedial measures to correct or mitigate harm from the conduct which serves as a basis for disciplinary action under the Act;

(M) [~~(13)~~] lack of rehabilitative potential or likelihood for future conduct of a similar nature;

(N) [~~(14)~~] relevant circumstances increasing the seriousness of the conduct which serves as a basis for disciplinary action under the Act; and

(O) [~~(15)~~] circumstances indicating intoxication due to ingestion of alcohol and/or drugs.

(2) [~~(b)~~] Extenuation and Mitigation. The following may be considered as extenuating and mitigating factors so as to merit less severe or less restrictive action by the board:

[~~(1) absence of patient harm;~~]

[~~(2) absence of economic harm to any individual or entity;~~]

(A) [~~(3)~~] absence of potential harm to the public;

(B) [~~(4)~~] self-reported and voluntary admissions of the conduct which serves as a basis for disciplinary action under the Act;

(C) [~~(5)~~] absence of premeditation to commit the conduct which serves as a basis for disciplinary action under the Act;

(D) [~~(6)~~] absence of intent to commit the conduct which serves as a basis for disciplinary action under the Act;

[~~(7) motive;~~]

(E) [~~(8)~~] absence of prior conduct of a similar or related nature;

(F) [~~(9)~~] absence of [~~a~~] disciplinary actions taken by any regulatory agency of the federal government or any state;

(G) [~~(10)~~] implementation of remedial measures to correct or mitigate harm from the conduct which serves as a basis for disciplinary action under the Act;

(H) [~~(11)~~] rehabilitative potential;

(I) [~~(12)~~] prior community service and present value to the community;

(J) [~~(13)~~] relevant circumstances reducing the seriousness of the conduct which serves as a basis for disciplinary action under the Act;

(K) [~~(14)~~] relevant circumstances lessening responsibility for the conduct which serves as a basis for disciplinary action under the Act; and

(L) [~~(15)~~] treatment and/or monitoring of an impairment.

§281.63. Considerations for Criminal Offenses.

(a) - (h) (No change.)

(i) The board has determined that the following crimes directly relate to duties and responsibilities of board licensees or registrants. The commission of each indicates an inability or a tendency for the person to be unable to perform or to be unfit for licensure or registration, because commission [~~violation~~] of such crimes indicates a lack of integrity and respect for one's fellow human being and the community at large. Even if the commission of these crimes did not occur while the licensee or registrant was on-duty or employed at a pharmacy, the board has determined that the crimes directly relate to the practice of phar-

macy based on a lack of integrity and good moral character exhibited by the commission of the crimes. In addition, the direct relationship to a license or registration is presumed when any crime occurs in connection with the practice of pharmacy or the operation of a pharmacy. The crimes are as follows:

(1) practicing or operating a pharmacy without a license or registration and other violations of the Pharmacy Act;

(2) deceptive business practices under the Texas Penal Code;

(3) medicare or medicaid fraud;

(4) a misdemeanor or felony offense under the Texas Penal Code involving:

(A) murder;

(B) assault;

(C) burglary;

(D) robbery;

(E) theft;

(F) sexual assault;

(G) injury to a child;

(H) injury to an elderly person;

(I) child abuse or neglect;

(J) tampering with a governmental record;

(K) forgery;

(L) perjury;

(M) failure to report abuse;

(N) bribery;

(O) harassment;

(P) insurance claim fraud;

(Q) driving while intoxicated;

(R) solicitation of professional employment under the Penal Code §38.12(d) or Occupations Code, Chapter 102;

(S) mail fraud; or

(T) any criminal offense which requires the individual to register with the Department of Public Safety as a sex offender under Chapter 62, Code of Criminal Procedure.

(5) any crime of moral turpitude;

(6) a misdemeanor or felony offense under Chapters 431 and 481 through 486, Health and Safety Code and the Comprehensive Drug Abuse Prevention and Control Act of 1970; or

(7) other misdemeanors or felonies which serve as grounds for discipline under the Act, including violations of the Penal Code, Titles 4, 5, 6, 7, 8, 9, and 10, which indicate an inability or tendency for the person to be unable to perform as a licensee or registrant, or to be unfit for licensure or registration, if action by the board will promote the intent of the Pharmacy Act, board rules including this chapter, and Occupations Code, Chapter 53.

§281.64. Sanctions for Criminal Offenses.

(a) The guidelines for disciplinary sanctions apply to criminal convictions and to deferred adjudication community supervisions or deferred dispositions, as authorized by the Act, for all types of licensees and registrants including applicants for such licenses and registrations issued by the board. The board considers criminal behavior to be highly relevant to an individual's fitness to engage in pharmacy practice and has determined that the sanctions imposed by these guidelines promote the intent of §551.002 of the Act. The "date of disposition," when referring to the number of years used to calculate the application of disciplinary sanctions, refers to the date a conviction, a deferred adjudication, or a deferred disposition is entered by the court. The use of the term "currently on probation" is construed to refer to individuals currently serving community supervision or any other type of probationary term imposed by an order of a court for a conviction, deferred adjudication, or deferred disposition.

(b) (No change.)

(c) The board has determined that the nature and seriousness of certain crimes outweigh other factors to be considered in §281.63(g) of this title (relating to Considerations for Criminal Offenses) and necessitate the disciplinary action listed below. The following sanctions apply to individuals with the criminal offenses as described below:

(1) Criminal offenses which require the individual to register with the Department of Public Safety as a sex offender under Chapter 62, Code of Criminal Procedure--denial;

(2) Felony offenses:

(A) Drug-related offenses, such as those listed in Chapter 481 or 483, Health and Safety Code:

(i) Offenses involving manufacture, delivery, or possession with intent to deliver, fraud, or theft of drugs:

(I) Currently on probation--denial or revocation;

(II) 0 - 5 years since date of disposition--denial or revocation;

(III) 6 - 10 years since date of disposition--denial or revocation;

(IV) 11 - 20 years since date of disposition--denial or revocation;

(V) Over 20 years since date of disposition--5 years probation;

(ii) Offenses involving possession of drugs:

(I) Currently on probation--denial, revocation, or suspension; [~~or revocation;~~]

(II) 0 - 5 years since date of disposition--evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 5 years probation;

(III) 6 - 10 years since date of disposition--evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 3 years probation;

(IV) 11 - 20 years since date of disposition--2 years probation;

(V) Over 20 years since date of disposition--1 year probation;

(B) Offenses involving sexual contact or violent acts, or offenses considered to be felonies of the first degree under the Texas Penal Code:

(i) Currently on probation--denial or revocation;

(ii) 0-5 years since date of disposition--denial or revocation;

(iii) 6-10 years since date of disposition--denial or revocation;

(iv) 11-20 years since date of disposition--5 years probation;

(v) Over 20 years since date of disposition--1 year probation;

(C) Other felony offenses:

(i) Currently on probation--denial, revocation, or suspension; [~~or revocation;~~]

(ii) 0 - 5 years since date of disposition--5 years probation;

(iii) 6 - 10 years since date of disposition--3 years probation;

(iv) 11 - 20 years since date of disposition--1 year probation;

(3) Misdemeanor offenses:

(A) Drug-related offenses, such as those listed in Chapter 481 or 483, Health and Safety Code:

(i) Offenses involving manufacture, delivery, or possession with intent to deliver, fraud, or theft of drugs:

(I) Currently on probation--denial or revocation;

(II) 0-10 years since date of disposition--5 years probation;

(III) Over 10 years since date of disposition--3 years probation;

(ii) Offenses involving possession of drugs:

(I) Pharmacists:

(-a-) 0 - 5 years since date of disposition--evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 5 years probation;

(-b-) 6 - 10 years since date of disposition--evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 3 years probation;

(II) Pharmacy Technicians and Pharmacy Technician Trainees:

(-a-) 0 - 5 years since date of disposition and determined to have a drug or alcohol dependency--5 years probation;

(-b-) 0 - 5 years since date of disposition and not determined to have a drug or alcohol dependency--1 year probation;

(-c-) 6 - 10 years since date of disposition and determined to have a drug or alcohol dependency--3 years probation;

(B) Intoxication and alcoholic beverage offenses as defined in the Texas Penal Code, if two such offenses occurred in the previous ten years:

(i) Pharmacists:

(I) 0-5 years since date of disposition--evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 5 years probation;

(II) 6-10 years since date of disposition--evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 3 years probation;

(ii) Pharmacy Technicians and Pharmacy Technician Trainees: 0- 5 years since date of disposition and determined to have a drug or alcohol dependency--5 years probation;

(C) Other misdemeanor offenses involving moral turpitude: 0 - 5 years since date of disposition--reprimand.

(d) - (e) (No change.)

§281.65. Schedule of Administrative Penalties [~~administrative penalties~~].

The board has determined that the assessment of an administrative penalty promotes the intent of §551.002 of the Act. In disciplinary matters, the board may assess an administrative penalty in addition to any other disciplinary action in the circumstances and amounts as follows:

(1) (No change.)

(2) The following violations by a pharmacy may be appropriate for disposition with an administrative penalty with or without additional sanctions or restrictions:

(A) failure to provide patient counseling: $1,500;

(B) failure to conduct a drug regimen review or inappropriate drug regimen reviews provided by §291.33(c)(2)(A) of this title (relating to Operational Standards): $1,500;

(C) failure to clarify a prescription with the prescriber: $1,500;

(D) failure to properly supervise or improperly delegating a duty to a pharmacy technician: $1,500;

(E) failure to identify the dispensing pharmacist on required pharmacy records: $500;

(F) failure to maintain records of prescriptions: $500;

(G) failure to provide or providing false or fraudulent information on any application, notification, or other document required under this Act, the Dangerous Drug Act, or Controlled Substances Act, or rules adopted pursuant to those Acts: $1,000;

(H) shortages of prescription drugs following an accountability audit: up to $5,000;

(I) dispensing a prescription drug pursuant to a forged, altered, or fraudulent prescription: up to $5,000;

(J) dispensing unauthorized prescriptions: up to $5,000;

(K) dispensing controlled substances or dangerous drugs to an individual or individuals in quantities, dosages, or for periods of time which grossly exceed standards of practice, approved labeling of the federal Food and Drug Administration, or the guidelines published in professional literature: up to $5,000;

(L) violating the reporting provisions of an Order of the Board: $1,000 - $5,000;

(M) failure to report or to assure the report of a malpractice claim: up to $1,000;

(N) failure to respond within the time specified on a warning notice to such warning notice issued as a result of a compliance inspection or responding to a warning notice as a result of a compliance inspection in a manner that is false or misleading: up to $1,000;

(O) allowing a pharmacist to practicing pharmacy with a delinquent license: $250 - $1,000;

(P) operating a pharmacy with a delinquent license: $1,000 - $5,000;

(Q) allowing an individual to perform the duties of a pharmacy technician without a valid registration: $250 - $1500; [~~$250 - $1,000;~~]

(R) failure to comply with the requirements of the Official Prescription Program: up to $1,000;

(S) aiding and abetting the unlicensed practice of pharmacy, if an employee of the pharmacy knew or reasonably should have known that the person engaging in the practice of pharmacy was unlicensed at the time: up to $5,000;

(T) a conviction or deferred adjudication for a misdemeanor or felony which serves as a ground for discipline under the Act: up to $5,000;

(U) unauthorized substitutions: $1,000;

(V) false or fraudulent claims to third parties for reimbursement of pharmacy services: up to $5,000;

(W) possessing or engaging in the sale, purchase, or trade or the offer to sell, purchase, or trade of misbranded prescription drugs or prescription drugs beyond the manufacturer's expiration date: up to $1,000;

(X) possessing or engaging in the sale, purchase, or trade or the offer to sell, purchase, or trade of prescription drug samples as provided by §281.8(b)(2) of this title (relating to Grounds for Discipline for a Pharmacy License): up to $1,000;

(Y) failure to keep, maintain or furnish an annual inventory as required by §291.17 of this title (relating to Inventory Requirements): $1,000;

(Z) failure to obtain training on the preparation of sterile pharmaceutical compounding: $1,500;

(AA) failure to maintain the confidentiality of prescription records: $1,000 - $5,000;

(BB) failure to inform the board of any notification or information required to be reported by the Act or rules: $250 - $500.

(3) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802976
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 305-8028

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CHAPTER 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.15

The Texas State Board of Pharmacy proposes new §291.15, concerning Storage of Drugs. The proposed new rule, if adopted, provides the storage requirements for drugs in all classes of pharmacies.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that the storage of drugs is consistent between the different classes of pharmacies and USP guidelines. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed new rule may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., July 21, 2008.

The new rule is proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.15. Storage of Drugs.

All drugs shall be stored at the proper temperature and conditions as defined by the following terms:

(1) Freezer--A place in which the temperature is maintained thermostatically between minus 25 degrees Celsius and minus 10 degrees Celsius (minus 13 degrees Fahrenheit and 14 degrees Fahrenheit).

(2) Cold--Any temperature not exceeding 8 degrees Celsius (46 degrees Fahrenheit). A refrigerator is a cold place in which the temperature is maintained thermostatically between 2 degrees Celsius and 8 degrees Celsius (36 degrees Fahrenheit and 46 degrees Fahrenheit).

(3) Cool--Any temperature between 8 degrees Celsius and 15 degrees Celsius (46 degrees Fahrenheit and 59 degrees Fahrenheit). An article for which storage in a cool place is directed may, alternatively, be stored and distributed in a refrigerator, unless otherwise specified by the individual monograph.

(4) Room temperature--The temperature prevailing in a working area.

(5) Controlled room temperature--A temperature maintained thermostatically between 15 degrees Celsius and 30 degrees Celsius (59 degrees Fahrenheit and 86 degrees Fahrenheit).

(6) Warm--Any temperature between 30 degrees Celsius and 40 degrees Celsius (86 degrees Fahrenheit and 104 degrees Fahrenheit).

(7) Excessive heat--Any temperature above 40 degrees Celsius (104 degrees Fahrenheit).

(8) Protection from freezing--Where, in addition to the risk of breakage of the container, freezing subjects a product to loss of strength or potency, or to destructive alteration of the dosage form, the container label bears an appropriate instruction to protect the product from freezing.

(9) Dry place--A place that does not exceed 40% average relative humidity at controlled room temperature or the equivalent water vapor pressure at other temperatures.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802977
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 305-8028

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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §§291.72 - 291.74

The Texas State Board of Pharmacy proposes amendments to §291.72, concerning Definitions, §291.73, concerning Personnel, and §291.74, concerning Operational Standards. The proposed amendments to §291.72, if adopted, define physically present supervision and electronic supervision. The proposed amendments to §291.73, if adopted, require the pharmacy to document the identity of each pharmacist involved in a specific portion of the distribution process if the pharmacy's data processing system is capable of recording such information and outline the duties for pharmacy technicians and pharmacy technician trainees that must be performed under the physically present supervision of a pharmacist and duties that may be performed under the electronic supervision of a pharmacist. The proposed amendments to §291.74, if adopted, remove the storage of drugs requirements and locate the requirements in new §291.15 proposed elsewhere in this issue of the *Texas Register,* and replace the term substitute with the term interchange.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will be to ensure pharmacy technicians and pharmacy technician trainees working in Class C pharmacies are appropriately supervised by a pharmacist, ensure the storage of drugs is consistent with other classes of pharmacy and USP guidelines, and clarify the rules regarding formularies in hospitals. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with the sections.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., July 21, 2008.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.72. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (43) (No change.)

(44) Supervision--

(A) Physically present supervision--In a Class C pharmacy, a pharmacist shall be physically present to directly supervise pharmacy technicians or pharmacy technician trainees.

(B) Electronic supervision--In a Class C pharmacy in a facility licensed for 100 beds or less, a pharmacist licensed in Texas may electronically supervise pharmacy technicians or pharmacy technician trainees to perform the duties specified in §291.73(e)(2) of this title (relating to Personnel) provided:

(i) the pharmacy uses a system that monitors the data entry of medication orders and the filling of such orders by an electronic method that shall include the use of one or more the following types of technology:

(I) digital interactive video, audio, or data transmission;

(II) data transmission using computer imaging by way of still-image capture and store and forward; and

(III) other technology that facilitates access to pharmacy services;

(ii) the pharmacy establishes controls to protect the privacy and security of confidential records;

(iii) the pharmacist responsible for the duties performed by a pharmacy technician or pharmacy technician trainee verifies:

(I) the data entry; and

(II) the accuracy of the filled orders prior to release of the order; and

(iv) the pharmacy keeps permanent digital records of duties electronically supervised and data transmissions associated with electronically supervised duties for a period of two years.

(C) If the conditions of subparagraph (B) of this paragraph are met, electronic supervision shall be considered the equivalent of direct supervision for the purposes of the Act.

(45) [~~(44)~~] Texas Controlled Substances Act--The Texas Controlled Substances Act, the Health and Safety Code, Chapter 481, as amended.

(46) [~~(45)~~] Unit-dose packaging--The ordered amount of drug in a dosage form ready for administration to a particular patient, by the prescribed route at the prescribed time, and properly labeled with name, strength, and expiration date of the drug.

(47) [~~(46)~~] Unusable drugs--Drugs or devices that are unusable for reasons, such as they are adulterated, misbranded, expired, defective, or recalled.

(48) [~~(47)~~] Written protocol--A physician's order, standing medical order, standing delegation order, or other order or protocol as defined by rule of the Texas Medical Board under the Texas Medical Practice Act Subtitle B, Chapter 157, Occupations Code.

§291.73. Personnel.

(a) - (c) (No change.)

(d) Pharmacists.

(1) General.

(A) - (D) (No change.)

(E) A distributing pharmacist shall be responsible for and ensure that the drug is prepared for distribution safely, and accurately as prescribed unless the pharmacy's data processing system can record the identity of each pharmacist involved in a specific portion of the preparation of medication orders for distribution, in which case each pharmacist involved in the preparation of medication orders shall be responsible for and ensure that the portion of the process the pharmacist is performing results in the safe and accurate distribution and delivery of the drug as ordered. [~~In addition, if multiple pharmacists participate in the preparation of medication orders for distribution, each pharmacist shall ensure the safety and accuracy of the portion of the process the pharmacist is performing.~~] The preparation and distribution process for medication orders shall include, but not be limited to, drug regimen review, and verification of accurate medication order data entry, preparation, and distribution, and performance of the final check of the prepared medication.

(2) - (3) (No change.)

(e) Pharmacy technicians and pharmacy technician trainees.

(1) General. All pharmacy technicians and pharmacy technician trainees shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician and Pharmacy Technician Trainee Training).

(2) Duties. Duties may include, but need not be limited to, the following functions under the [~~direct~~] supervision of and responsible to a pharmacist:

(A) Facilities licensed for 101 beds or more. The following functions must be performed under the physically present supervision of a pharmacist:

(i) pre-packing and labeling unit and multiple dose packages, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her signature (first initial and last name or full signature) or electronic signature to the appropriate quality control records;

(ii) preparing, packaging, compounding, or labeling prescription drugs pursuant to medication orders, provided a pharmacist supervises and checks the preparation;

(iii) bulk compounding or batch preparation provided a pharmacist supervises and conducts in-process and final checks and affixes his or her initials to the appropriate quality control records;

(iv) distributing routine orders for stock supplies to patient care areas;

(v) entering medication order and drug distribution information into a data processing system, provided judgmental decisions are not required and a pharmacist checks the accuracy of the information entered into the system prior to releasing the order;

(vi) loading bulk unlabeled drugs into an automated compounding or counting device provided a pharmacist supervises, verifies that the system was properly loaded prior to use, and affixes his or her signature (first initial and last name or full signature) or electronic signature to the appropriate quality control records;

(vii) accessing automated medication supply systems after proper training on the use of the automated medication supply system and demonstration of comprehensive knowledge of the written policies and procedures for its operation;

(viii) compounding non-sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees have completed the training specified in §291.131 of this title; and

(ix) compounding sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees:

(I) have completed the training specified in §291.133 of this title; and

(II) are supervised by a pharmacist who has completed the training specified in §291.133 of this title and who conducts in-process and final checks, and affixes his or her initials to the label or if batch prepared, to the appropriate quality control records. (The initials are not required on the label if it is maintained in a permanent record of the pharmacy.)

(B) Facilities licensed for 100 beds or less.

(i) Physically present supervision. The following functions must be performed under the physically present supervision of a pharmacist:

(I) pre-packing and labeling unit and multiple dose packages, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her signature (first initial and last name or full signature) or electronic signature to the appropriate quality control records;

(II) bulk compounding or batch preparation provided a pharmacist supervises and conducts in-process and final checks and affixes his or her initials to the appropriate quality control records;

(III) loading bulk unlabeled drugs into an automated compounding or counting device provided a pharmacist supervises, verifies that the system was properly loaded prior to use, and affixes his or her signature (first initial and last name or full signature) or electronic signature to the appropriate quality control records; and

(IV) compounding medium-risk and high-risk sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees:

(-a-) have completed the training specified in §291.133 of this title; and

(-b-) are supervised by a pharmacist who has completed the training specified in §291.133 of this title, and who conducts in-process and final checks, and affixes his or her initials to the label or if batch prepared, to the appropriate quality control records. (The initials are not required on the label if it is maintained in a permanent record of the pharmacy.)

(ii) Electronic supervision or physically present supervision. The following functions may be performed under the electronic supervision or physically present supervision of a pharmacist:

(I) preparing, packaging, or labeling prescription drugs pursuant to medication orders, provided a pharmacist checks the preparation;

(II) distributing routine orders for stock supplies to patient care areas;

(III) entering medication order and drug distribution information into a data processing system, provided judgmental decisions are not required and a pharmacist checks the accuracy of the information entered into the system prior to releasing the order;

(IV) accessing automated medication supply systems after proper training on the use of the automated medication supply system and demonstration of comprehensive knowledge of the written polices and procedures for its operation;

(V) compounding non-sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees have completed the training specified in §291.131 of this title; and

(VI) compounding low-risk sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees:

(-a-) have completed the training specified in §291.133 of this title; and

(-b-) are supervised by a pharmacist who has completed the training specified in §291.133 of this title, and who conducts in-process and final checks, and affixes his or her initials to the label or if batch prepared, to the appropriate quality control records. (The initials are not required on the label if it is maintained in a permanent record of the pharmacy.)

~~[(A) pre-packing and labeling unit and multiple dose packages, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her signature (first initial and last name or full signature) or electronic signature to the appropriate quality control records;]~~

~~[(B) preparing, packaging, compounding, or labeling prescription drugs pursuant to medication orders, provided a pharmacist supervises and checks the preparation;]~~

~~[(C) bulk compounding or batch preparation provided a pharmacist supervises and conducts in-process and final checks and affixes his or her initials to the appropriate quality control records;]~~

~~[(D) distributing routine orders for stock supplies to patient care areas;]~~

~~[(E) entering medication order and drug distribution information into a data processing system, provided judgmental decisions are not required and a pharmacist checks the accuracy of the information entered into the system prior to releasing the order or in compliance with the absence of pharmacist requirements contained in §291.74(e) of this title (relating to Operational Standards);]~~

~~[(F) loading bulk unlabeled drugs into an automated compounding or counting device provided a pharmacist supervises, verifies that the system was properly loaded prior to use, and affixes his or her signature (first initial and last name or full signature) or electronic signature to the appropriate quality control records; and]~~

~~[(G) may be allowed access to automated medication supply systems after proper training on the use of the automated medication supply system and demonstration of comprehensive knowledge of the written policies and procedures for its operation.]~~

~~[(H) compounding sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees:]~~

~~*[(i)* have completed the training specified in §291.133 of this title (relating to Pharmacies Compounding Sterile Preparations); and]~~

~~*[(ii)* are supervised by a pharmacist who has completed the training specified in §291.133 of this title and who conducts in-process and final checks, and affixes his or her initials to the label or if batch prepared, to the appropriate quality control records. (The initials are not required on the label if it is maintained in a permanent record of the pharmacy.)]~~

~~[(3) Special requirements for compounding.]~~

~~[(A) Non-Sterile Preparations. All pharmacy technicians and pharmacy technician trainees engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title.]~~

~~[(B) Sterile Preparations. Pharmacy technicians and pharmacy technician trainees engaged in compounding sterile preparations shall meet the training requirements specified in §291.133 of this title.]~~

(3) [~~(4)~~] Procedures.

(A) Pharmacy [~~pharmacy~~] technicians and pharmacy technician trainees shall handle medication orders in accordance with standard, written procedures and guidelines.

(B) Pharmacy [~~pharmacy~~] technicians and pharmacy technician trainees shall handle prescription drug orders in the same manner as those working in a Class A pharmacy.

(f) - (g) (No change.)

§291.74. Operational Standards.

(a) - (e) (No change.)

(f) Drugs.

(1) Procurement, preparation and storage.

(A) - (C) (No change.)

(D) All drugs shall be stored at the proper temperatures, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs) [~~by the following~~].

~~*[(i)* Cold--Any temperature not exceeding 8 degrees Centigrade (46 degrees Fahrenheit). A refrigerator is a cold place in which the temperature is maintained thermostatically between 2 and 8 degrees Centigrade (36 and 46 degrees Fahrenheit). A freezer is a cold place in which the temperature is maintained thermostatically between -20 and -10 degrees Centigrade (-4 and 14 degrees Fahrenheit).]~~

~~*[(ii)* Cool--Any temperature between 8 and 15 degrees Centigrade (46 and 59 degrees Fahrenheit). An article for which storage in a cool place is directed may, alternatively, be stored in a refrigerator unless otherwise specified in the labeling.]~~

~~*[(iii)* Room temperature--The temperature prevailing in a working area. Controlled room temperature is a temperature thermostatically between 15 and 30 degrees Centigrade (59 and 86 degrees Fahrenheit).]~~

~~*[(iv)* Warm--Any temperature between 30 and 40 degrees Centigrade (86 and 104 degrees Fahrenheit).]~~

~~*[(v)* Excessive heat--Any temperature above 40 degrees Centigrade (104 degrees Fahrenheit).]~~

~~*[(vi)* Protection from freezing where, in addition to the risk of breakage of the container, freezing subjects a product to loss of strength or potency, or to destructive alteration of the dosage~~

~~form, the container label bears an appropriate instruction to protect the product from freezing.]~~

(E) Any drug bearing an expiration date may not be distributed beyond the expiration date of the drug.

(F) Outdated and other unusable drugs shall be removed from stock and shall be quarantined together until such drugs are disposed of properly.

(2) Formulary.

(A) A formulary shall be developed by the facility committee performing the pharmacy and therapeutics function for the facility. For the purpose of this section, a formulary is a compilation of pharmaceuticals that reflects the current clinical judgment of a facility's medical staff.

(B) The pharmacist-in-charge or pharmacist designated by the pharmacist-in-charge shall be a full voting member of the committee performing the pharmacy and therapeutics function for the facility, when such committee is performing the pharmacy and therapeutics function.

(C) A practitioner may grant approval for pharmacists at the facility to interchange [~~substitute~~], in accordance with the facility's formulary, for the prescribed drugs on the practitioner's medication orders provided:

(i) the pharmacy and therapeutics committee has developed a formulary;

(ii) the formulary has been approved by the medical staff committee of the facility;

(iii) there is a reasonable method for the practitioner to override any interchange [~~substitution~~]; and

(iv) the practitioner authorizes pharmacists in the facility to interchange [~~substitute~~] on his/her medication orders in accordance with the facility's formulary through his/her written agreement to abide by the policies and procedures of the medical staff and facility.

(3) - (5) (No change.)

(g) - (j) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802978
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 305-8028

♦ ♦ ♦

SUBCHAPTER E. CLINIC PHARMACY (CLASS D)

22 TAC §§291.91 - 291.94

The Texas State Board of Pharmacy proposes amendments to §291.91, concerning Definitions, §291.92, concerning Personnel, §291.93, concerning Operational Standards, and §291.94, concerning Records. The amendments, if adopted, incorporate the recommendations of the Task Force on Clinic Pharmacies (Class D). Specifically, the amendments, if adopted, update the definition of "practitioner" to be consistent with the Texas Pharmacy Act; update formulary requirements to allow Class D pharmacies with expanded formularies to have antipsychotic drugs; prohibit Class D pharmacies from having Carisoprodal or drugs used to treat erectile dysfunction; allow Class D pharmacies with expanded formularies including drugs requiring special monitoring to submit policies and procedures regarding the provision of such drugs; clarify that Class D pharmacies wishing to add drugs to an expanded formulary must make such a request in writing to the Board prior to adding the drugs; require pharmacists to conduct retrospective drug reviews on a quarterly basis in Class D pharmacies with expanded formularies; require an initial order by a physician for antipsychotic drugs provided in a Class D pharmacy, followed by monitored therapy and at least yearly physical exams by the physician; and require a licensed nurse or practitioner to provide verbal and written information to the patient.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will be to ensure patients receiving medications at Class D pharmacies are appropriate and safe. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with the sections.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., July 21, 2008.

The amendments are proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.91. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (15) (No change.)

(16) Practitioner--

(A) a person licensed or registered to prescribe, distribute, administer, or dispense a prescription drug or device in the course of professional practice in this state, including a physician, dentist, podiatrist, or veterinarian but excluding a person licensed under the Act;

(B) a person licensed by another state, Canada, or the United Mexican States in a health field in which, under the law of this state, a license holder in this state may legally prescribe a dangerous drug;

(C) a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has

a current federal Drug Enforcement Administration registration number and who may legally prescribe a Schedule II, III, IV, or V controlled substance, as specified under Chapter 481, Health and Safety Code, in that other state; or

(D) an advanced practice nurse or physician assistant to whom a physician has delegated the authority to carry out or sign prescription drug orders under §§157.0511, 157.052, 157.053, 157.054, 157.0541, or 157.0542, Occupations Code.

[(16) Practitioner.]

[(A) a physician, dentist, podiatrist, veterinarian, or other person licensed or registered to distribute or dispense a prescription drug or device in the course of professional practice in this state;]

[(B) a person licensed by another state in a health field in which, under Texas law, licensees in this state may legally prescribe dangerous drugs or a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, having a current federal Drug Enforcement Administration registration number, and who may legally prescribe Schedule II, III, IV, or V controlled substances in such other state; or]

[(C) a person licensed in the Dominion of Canada or the United Mexican States in a health field in which, under the laws of this state, a licensee may legally prescribe dangerous drugs;]

[(D) does not include a person licensed under the Act.]

(17) - (22) (No change.)

§291.92. Personnel.

(a) Pharmacist-in-charge.

(1) (No change.)

(2) Responsibilities. The pharmacist-in-charge shall have at a minimum, the responsibility for the following:

(A) continuous supervision of registered nurses, licensed vocational nurses, physician assistants, pharmacy technicians, pharmacy technician trainees, and assistants carrying out the pharmacy related aspects of provision;

(B) documented periodic on-site visits as specified in §291.93(h) and §291.94(b) [§291.94(a)] of this title (relating to Operational Standards and Records), either personally or by the consultant pharmacist or staff pharmacist, to insure that the clinic is following set policies and procedures; documentation shall be as specified in §291.94(b) [§291.94(a)] of this title;

(C) development of a formulary for the clinic, in conjunction with the clinic's pharmacy and therapeutics committee, consisting of drugs and/or devices needed to meet the objectives of the clinic;

(D) procurement and storage of drugs and/or devices, but he or she may receive input from other appropriate staff of the clinic;

(E) determining specifications of all drugs and/or devices procured by the clinic;

(F) maintenance of records of all transactions of the pharmacy as may be required by applicable law and as may be necessary to maintain accurate control over and accountability for all drugs and/or devices;

(G) development and at least annual [periodic] review of a policy and procedure manual for the pharmacy in conjunction with the clinic's pharmacy and therapeutics committee;

(H) meeting inspection and other requirements of the Texas Pharmacy Act and these sections;

(I) dispensing of prescription orders; and

(J) conducting inservice training at least annually for supportive personnel who provide drugs; such training shall be related to actions, contraindications, adverse reactions, and pharmacology of drugs contained in the formulary.

(b) - (c) (No change.)

(d) Supportive personnel.

(1) Qualifications.

(A) Supportive personnel shall possess education and training necessary to carry out their responsibilities.

(B) Supportive personnel shall be qualified to perform the pharmacy tasks assigned to them.

(2) Duties. Duties may include:

[(A) provision of drugs and/or devices under the continuous supervision of a pharmacist according to standing delegation orders or standing medical orders and in accordance with written policies and procedures and completion of the label as specified in §291.93(e)(6)(F) of this title (relating to Operational Standards);]

(A) [(B)] prepackaging and labeling unit of use packages, under the direct supervision of a pharmacist with the pharmacist conducting in-process and final checks and affixing his or her signature to the appropriate quality control records;

(B) [(C)] maintaining inventories of drugs and/or devices; and

(C) [(D)] maintaining pharmacy records.

(3) Absence of the pharmacist. The pharmacist-in-charge shall designate from among the supportive personnel a person to supervise the day-to-day pharmacy-related operations of the clinic.

(e) Owner. The owner of a Class D pharmacy shall have responsibility for all administrative and operational functions of the pharmacy. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The owner shall have responsibility for, at a minimum, the following, and if the owner is not a Texas licensed pharmacist, the owner shall consult with the pharmacist-in-charge or another Texas licensed pharmacist:

(1) - (4) (No change.)

§291.93. Operational Standards.

(a) Registration.

(1) General requirements.

(A) - (G) (No change.)

(H) A clinic [Class D (clinic)] pharmacy shall notify the board in writing of any change in name or location within 10 days.

(I) - (K) (No change.)

(2) (No change.)

(b) Environment.

(1) (No change.)

(2) Security.

(A) Only authorized personnel may have access to storage areas for dangerous drugs and/or devices.

(B) All storage areas for dangerous drugs and/or devices shall be locked by key, [~~or~~] combination, or other mechanical or electronic means, so as to prohibit access by unauthorized individuals [~~so as to prevent access by unauthorized personnel~~].

(C) The pharmacist-in-charge shall be responsible for the security of all storage areas for dangerous drugs and/or devices including provisions for adequate safeguards against theft or diversion of dangerous drugs and devices, and records for such drugs and devices.

(D) The pharmacist-in-charge shall consult with clinic personnel with respect to security of the pharmacy, including provisions for adequate safeguards against theft or diversion of dangerous drugs and/or devices, and records for such drugs and/or devices.

(E) Housekeeping and maintenance duties shall be carried out in the pharmacy, while the pharmacist-in-charge, consultant pharmacist, staff pharmacist, or supportive personnel is on the premises.

(c) (No change.)

(d) Library. A reference library shall be maintained which includes the following in hard copy or electronic format:

(1) current copies of the following [~~laws~~]:

(A) Texas Pharmacy Act and rules; and

(B) Texas Dangerous Drug Act [~~Law~~];

(2) current copies of at least two of the following references:

(A) Facts and Comparisons with current supplements;

(B) AHFS Drug Information;

(C) United States Pharmacopeia Dispensing Information (USPDI);

(D) Physician's Desk Reference (PDR);

(E) American Drug Index;

(F) a reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken; [~~Hansten's and Horn's Drug Interactions Analysis and Management;~~]

(G) reference texts in any of the following subjects: toxicology, pharmacology, or drug interactions; or

(H) reference texts pertinent to the major function(s) of the clinic.

(e) Drugs and devices.

(1) Formulary.

(A) Each Class D pharmacy shall have a formulary which lists all drugs and devices that are administered, dispensed, or provided by the Class D pharmacy.

(B) The formulary shall be limited to the following types of drugs and [~~and/or~~] devices, exclusive of injectable drugs for administration in the clinic and nonprescription drugs, except as provided in subparagraph (D) of this paragraph:

(i) - (vi) (No change.)

(C) The formulary shall not contain the following drugs or types of drugs:

(i) Nalbuphine (Nubain);

(ii) Carisoprodal (Soma); [~~antipsychotics; and~~]

(iii) drugs used to treat erectile dysfunction; and

(iv) [~~(iii)~~] Schedule I-V controlled substances.

(D) Clinics with a patient population which consists of at least 80% indigent patients may petition the board to operate with a formulary which includes types of drugs and [~~and/or~~] devices, other than those listed in subparagraph (B) of this paragraph based upon documented objectives of the clinic, under the following conditions.

(i) Such petition shall contain an affidavit with the notarized signatures of the medical director, the pharmacist-in-charge, and the owner/chief executive officer of the clinic, and include the following documentation:

(I) the objectives of the clinic;

(II) the total number of patients served by the clinic during the previous fiscal year or calendar year;

(III) the total number of indigent patients served by the clinic during the previous fiscal year or calendar year;

(IV) the percentage of clinic patients who are indigent, based upon the patient population during the previous fiscal year or calendar year; [~~and~~]

(V) the proposed formulary and the need for additional types of drugs based upon objectives of the clinic; and [~~.~~]

(VI) if the provision of any drugs on the proposed formulary require special monitoring, the clinic pharmacy shall submit relevant sections of the clinic's policy and procedure manual regarding the provision of drugs that require special monitoring.

(ii) Such petition shall be resubmitted every two years in conjunction with the application for renewal of the pharmacy license.

(I) Such renewal petition shall contain the documentation required in clause (i) of this subparagraph.

(II) If at the time of renewal of the pharmacy license, the patient population for the previous fiscal year or calendar year is below 80% indigent patients, the clinic shall be required to submit an application for a Class A pharmacy license or shall limit the clinic formulary to those types of drugs and [~~and/or~~] devices listed in subparagraph [~~subparagraphs~~] (B) [~~and (C)~~] of this paragraph.

(iii) If a clinic pharmacy wishes to add additional drugs to the expanded formulary, the pharmacy shall petition the board in writing prior to adding such drugs to the formulary. The petition shall identify drugs to be added and the need for the additional drugs based upon objectives of the clinic as specified in clause (i) of this subparagraph.

(iv) [~~(iii)~~] The following additional requirements shall be satisfied for clinic pharmacies with expanded formularies.

(I) Supportive personnel who are providing drugs shall be licensed nurses or practitioners [~~physician assistants~~].

(II) The pharmacist-in-charge, consultant pharmacist, or staff pharmacist shall make on-site visits to the clinic at least monthly.

(III) If the pharmacy provides drugs which require special monitoring (i.e., drugs which require follow-up laboratory work or drugs which should not be discontinued abruptly), the pharmacy shall have policies and procedures for the provision of the

prescription drugs to patients and the monitoring of patients who receive such drugs.

(IV) The pharmacist-in-charge, consultant pharmacists, or staff pharmacists shall conduct retrospective drug regimen reviews of a random sample of patients of the clinic on at least a quarterly basis. The pharmacist-in-charge shall be responsible for ensuring that a report regarding the drug regimen review, including the number of patients reviewed, is submitted to the clinic's medical director and the pharmacy and therapeutics committee of the clinic.

(V) If a pharmacy provides antipsychotic drugs:

(-a-) a physician of the clinic shall initiate the therapy;

(-b-) a practitioner shall monitor and order ongoing therapy; and

(-c-) the patient shall be physically examined by the physician at least on a yearly basis.

(v) [~~(iv)~~] The board may consider the following items in approving or disapproving a petition for an expanded formulary:

(I) the degree of compliance on past compliance inspections;

(II) the size of the patient population of the clinic;

(III) the number and types of drugs contained in the formulary; and

(IV) the objectives of the clinic.

(2) Storage.

(A) Drugs and/or devices which bear the words "Caution, Federal Law Prohibits Dispensing without prescription" or "Rx only" shall be stored in secured storage areas.

(B) All drugs shall be stored at the proper temperatures, as defined in §291.15 of this title (relating to Storage of Drugs). [~~by the following terms.~~]

~~*(i)* Cold--Any temperature not exceeding 8 degrees Centigrade (46 degrees Fahrenheit). A refrigerator is a cold place in which the temperature is maintained thermostatically between 2 degrees and 8 degrees Centigrade (36 degrees and 46 degrees Fahrenheit). A freezer is a cold place in which the temperature is maintained thermostatically between -20 degrees and -10 degrees Centigrade (-4 degrees and 14 degrees Fahrenheit).~~

~~*(ii)* Cool--Any temperature between 8 degrees and 15 degrees Centigrade (46 degrees and 59 degrees Fahrenheit). An article for which storage in a cool place is directed may, alternatively, be stored in a refrigerator, unless otherwise specified in the individual monograph.~~

~~*(iii)* Room temperature--The temperature prevailing in a working area. Controlled room temperature is a temperature maintained thermostatically between 15 degrees and 30 degrees Centigrade (59 degrees and 86 degrees Fahrenheit).~~

~~*(iv)* Warm--Any temperature between 30 degrees and 40 degrees Centigrade (86 degrees and 104 degrees Fahrenheit).~~

~~*(v)* Excessive heat--Temperature above 40 degrees Centigrade (104 degrees Fahrenheit).~~

~~*(vi)* Protection from freezing--Where, in addition to the risk of breakage of the container, freezing subjects a product to loss of strength or potency, or to destructive alteration of the dosage form, the container label bears an appropriate instruction to protect the product from freezing.~~

(C) Any drug or [~~and/or~~] device bearing an expiration date may not be provided, dispensed, or administered beyond the expiration date of the drug or [~~and/or~~] device.

(D) Outdated drugs or [~~and/or~~] devices shall be removed from stock and shall be quarantined together until such drugs or [~~and/or~~] devices are disposed.

(E) Controlled substances may not be stored at the clinic pharmacy.

(3) Drug samples.

(A) Drug samples of drugs listed on the clinic pharmacy's formulary and supplied by manufacturers shall be properly stored, labeled, provided, or dispensed by the clinic pharmacy in the same manner as prescribed by these sections for dangerous drugs.

(B) Samples of controlled substances may not be stored, provided, or dispensed in the clinic pharmacy.

(4) Prepackaging and labeling for provision.

(A) Drugs may be prepackaged and labeled for provision in the clinic pharmacy. Such prepackaging shall be performed by a pharmacist or supportive personnel under the direct supervision of a pharmacist and shall be for the internal use of the clinic.

(B) Drugs must be prepackaged in suitable containers.

(C) The label of the prepackaged unit shall bear:

(i) the name, address, and telephone number [~~and address~~] of the clinic;

(ii) directions for use, which may include incomplete directions for use provided:

(I) labeling with incomplete directions for use has been authorized by the pharmacy and therapeutics committee;

(II) precise requirements for completion of the directions for use are developed by the pharmacy and therapeutics committee and maintained in the pharmacy policy and procedure manual; and

(III) the directions for use are completed by practitioners, pharmacists, licensed nurses or physician assistants in accordance with the precise requirements developed under subclause (II) of this clause;

(iii) name and strength of the drug--if generic name, the name of the manufacturer or distributor of the drug;

(iv) quantity;

(v) lot number and expiration date; and

(vi) appropriate ancillary label(s).

(D) Records of prepackaging shall be maintained according to §291.94(c) of this title (relating to Records).

(5) Labeling for provision of drugs and/or devices in an original manufacturer's container.

(A) Drugs and/or devices in an original manufacturer's container shall be labeled prior to provision with the information set out in paragraph (4)(C) of this subsection.

(B) Drugs and/or devices in an original manufacturer's container may be labeled by:

(i) a pharmacist in a pharmacy licensed by the board; or

(ii) supportive personnel in a Class D pharmacy, provided the drugs and/or devices and control records required by §291.94(d) of this title, are quarantined together until checked and released by a pharmacist.

(C) Records of labeling for provision of drugs and/or devices in an original manufacturer's container shall be maintained according to §291.94(d) of this title.

(6) Provision.

(A) Drugs and [~~and/or~~] devices may only be provided to patients of the clinic.

(B) At the time of provision, a licensed nurse or practitioner shall provide verbal and written information to the patient or patient's agent on side effects, interactions, and precautions concerning the drug or device provided. [~~the patient shall be provided verbal and/or written information on side effects, interactions, and precautions concerning the drug and/or device provided.~~]

(C) The provision of drugs or devices shall be under the continuous supervision of a pharmacist according to standing delegation orders or standing medical orders and in accordance with written policies and procedures and completion of the label as specified in subparagraph (G) of this paragraph.

(D) [~~(C)~~] Drugs and/or devices may only be provided in accordance with the system of control and accountability for drugs and/or devices provided by the clinic; such system shall be developed and supervised by the pharmacist-in-charge.

(E) [~~(D)~~] Only drugs and/or devices listed in the clinic formulary may be provided.

(F) [~~(E)~~] Drugs and/or devices may only be provided in prepackaged quantities in suitable containers and/or original manufacturer's containers which are appropriately labeled as set out in paragraphs (4) and (5) of this subsection.

(G) [~~(F)~~] Such drugs and/or devices shall be labeled by a pharmacist licensed by the board; however, when drugs and/or devices are provided under the supervision of a physician according to standing delegation orders or standing medical orders, supportive personnel may at the time of provision print on the label the following information:

(i) patient's name;

(ii) any information necessary to complete the directions for use in accordance with paragraph (4)(C)(ii) of this subsection;

(iii) date of provision; and

(iv) practitioner's name.

(H) [~~(G)~~] Records of provision shall be maintained according to §291.94(e) of this title.

(I) [~~(H)~~] Controlled substances may not be provided or dispensed.

(J) Non-sterile and sterile preparations may only be provided by the clinic pharmacy in accordance with §291.131 and §291.133 of this title (relating to Pharmacies Compounding Non-sterile Preparations and Pharmacies Compounding Sterile Preparations).

(7) Dispensing. Dangerous drugs may only be dispensed by a pharmacist pursuant to a prescription order in accordance with §§291.31 - 291.35 of this title (relating to Community Pharmacy (Class A)) and §291.131 and §291.133 of this title. [~~§§291.31 - 291.36 of this title (relating to Community Class A Pharmacy).~~]

(f) Pharmacy and therapeutics committee.

(1) The clinic pharmacy shall have a pharmacy and therapeutics committee, which [~~pharmacy and therapeutics committee~~] shall be composed of at least three persons and shall include the pharmacist-in-charge, the medical director of the clinic, and a person who is responsible for provision of drugs and [~~and/or~~] devices.

(2) The pharmacy and therapeutics committee shall develop the policy and procedure manual.

(3) The pharmacy and therapeutics committee shall meet at least annually to: [~~review and update the policy and procedure manual.~~]

(A) review and update the policy and procedure manual; and

(B) review the retrospective drug utilization review reports submitted by the pharmacist-in-charge if the clinic pharmacy has an expanded formulary.

(g) Policies and procedures.

(1) Written policies and procedures shall be developed by the pharmacy and therapeutics committee and implemented by the pharmacist-in-charge.

(2) The policy and procedure manual shall include, but not be limited to, the following:

(A) a current list of the names [~~and addresses~~] of the pharmacist-in-charge, consultant-pharmacist, staff pharmacist(s), supportive personnel designated to provide drugs or [~~and/or~~] devices, and the supportive personnel designated to supervise the day-to-day pharmacy related operations of the clinic in the absence of the pharmacist;

(B) functions of the pharmacist-in-charge, consultant pharmacist, staff pharmacist(s), and supportive personnel;

(C) objectives of the clinic;

(D) formulary;

(E) a copy of written agreement between the pharmacist-in-charge and the clinic;

(F) date of last review/revision of policy and procedure manual; and

(G) policies and procedures for:

(i) security;

(ii) equipment;

(iii) sanitation;

(iv) licensing;

(v) reference materials;

(vi) storage;

(vii) packaging-repackaging;

(viii) dispensing;

(ix) provision;

(x) retrospective drug regimen review;

(xi) [~~(x)~~] supervision;

(xii) [~~(xi)~~] labeling-relabeling;

(xiii) [~~(xii)~~] samples;

(xiv) [~~(xiii)~~] drug destruction and returns;

(xv) [~~(xiv)~~] drug and [~~and/or~~] device procuring;

(xvi) [~~(xv)~~] receiving of drugs and [~~and/or~~] devices;

(xvii) [~~(xvi)~~] delivery of drugs and [~~and/or~~] devices;

(xviii) [~~(xvii)~~] recordkeeping; and

(xix) [~~(xviii)~~] inspection.

(h) Supervision. The pharmacist-in-charge, consultant pharmacist, or staff pharmacist shall personally visit the clinic on at least a monthly basis to ensure that the clinic is following established policies and procedures. However, clinics operated by state or local governments and clinics funded by government sources money may petition the board for an alternative visitation schedule under the following conditions:

[~~(1) The pharmacist-in-charge, consultant pharmacist, or staff pharmacist shall be in contact with the clinic on at least a monthly basis, either through written memos, documented telephonic conferences, or on-site visits.~~]

[~~(2) The pharmacist-in-charge, consultant pharmacist, or staff pharmacist shall personally visit the clinic every three months to ensure that the clinic is following set policies and procedures, provided, however, that clinics who are operated by state or local governments and clinics who are funded by public money may petition the board for an alternative visitation schedule under the following conditions.~~]

(1) [~~(A)~~] Such petition shall contain an affidavit with the notarized signatures of the medical director, the pharmacist-in-charge, and the owner/chief executive officer of the clinic, which states that the clinic has a current policy and procedure manual on file, has adequate security to prevent diversion of dangerous drugs, and is in compliance with all rules governing Class D pharmacies.

(2) [~~(B)~~] The board may consider the following items in determining an alternative schedule:

(A) [~~(i)~~] the degree of compliance on past compliance inspections;

(B) [~~(ii)~~] the size of the patient population of the clinic;

(C) [~~(iii)~~] the number and types of drugs contained in the formulary; and

(D) [~~(iv)~~] the objectives of the clinic.

(3) [~~(C)~~] Such petition shall be resubmitted every two years in conjunction with the application for renewal of the pharmacy license.

§291.94. Records.

(a) Maintenance of records.

(1) Every inventory or other record required to be kept under the provisions of §291.91 of this title (relating to Definitions), §291.92 of this title (relating to Personnel), §291.93 of this title (relating to Operational Standards), and §291.94 of this title (relating to Records), contained in Clinic Pharmacy (Class D) shall be:

(A) kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(B) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in a mutually agreeable electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(2) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(A) the records maintained in the alternative system contain all of the information required on the manual record; and

(B) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(3) Invoices and records of receipt may be kept at a location other than the pharmacy. Any such records not kept at the pharmacy shall be supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy.

(b) [~~(a)~~] On-site visits. A record of on-site visits by the pharmacist-in-charge, consultant pharmacist, or staff pharmacist shall be maintained and include the following information:

(1) date of the visit;

(2) pharmacist's evaluation of findings; and

(3) signature of the visiting pharmacist.

[~~(b) Invoices or records of receipt.~~]

[~~(1) Each Class D pharmacy shall maintain invoices and/or records of procurement in accordance with the requirements of the Texas Dangerous Drug Law and the Texas Pharmacy Act and rules.~~]

[~~(2) Invoices and records of receipt may be kept at a location other than the pharmacy. Any such records not kept at the pharmacy shall be available for inspection, upon request, within two business days.~~]

(c) Prepackaging. Records of prepackaging shall include the following:

(1) name, strength, and dosage form [~~and strength~~] of drug;

(2) name of the manufacturer;

(3) manufacturer's lot number;

(4) [~~manufacturer's~~] expiration date;

(5) facility's lot number;

(6) [~~(5)~~] quantity per package and number of packages;

(7) [~~(6)~~] date packaged;

(8) [~~(7)~~] name(s), signatures, or electronic signatures of the supportive personnel who prepackages the drug under direct supervision of a pharmacist; and

(9) [~~(8)~~] name, signature, or electronic signature of the pharmacist who prepackages the drug or supervises the prepackaging and checks and releases the drug.

(d) Labeling. Records of labeling of drugs or [~~and/or~~] devices in original manufacturer's containers shall include the following:

(1) name and strength of the drug or device labeled;

(2) name of the manufacturer;

(3) manufacturer's lot number;

(4) manufacturer's expiration date;

(5) quantity per package and number of packages;

(6) date labeled;

(7) name of the supportive personnel affixing the label; and

(8) the signature of the pharmacist who checks and releases the drug.

(e) Provision. Records of drugs and/or devices provided shall include logs, patient records, or other acceptable methods for documentation. Documentation shall include:

(1) patient name;

(2) name, signature, or electronic signature of the person who provides the drug or device;

(3) date provided; and

(4) the name of the drug or device and quantity provided.

(f) Dispensing. Record-keeping requirements for dangerous drugs dispensed by a pharmacist are the same as for a Class A pharmacy as set out in §291.34 of this title (relating to Records).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER G. SERVICES PROVIDED BY PHARMACIES

22 TAC §291.133

The Texas State Board of Pharmacy proposes amendments to §291.133, concerning Pharmacies Compounding Sterile Preparations. The amendments, if adopted, remove the storage of drugs requirements from this section and locate the requirements in new §291.15 proposed elsewhere in this issue of the *Texas Register.*

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that the storage of drugs is consistent with other classes of pharmacies and USP guidelines. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., July 21, 2008.

The amendments are proposed under §551.002, and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.133 Pharmacies Compounding Sterile Preparations.

(a) - (c) (No change.)

(d) Operational Standards.

(1) - (4) (No change.)

(5) Environment. Compounding facilities shall be physically designed and environmentally controlled to minimize airborne contamination of critical sites.

(A) - (G) (No change.)

(H) Storage requirements and beyond-use dating.

(i) Storage requirements. All drugs shall be stored at the proper temperature and conditions, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs). [~~The most commonly used definitions are as follows:~~]

~~*[(I)* freezer--A place where the temperature is maintained thermostatically between minus 25 degrees and minus 10 degrees Celsius (minus 13 degrees Fahrenheit and 14 degrees Fahrenheit).]~~

~~*[(II)* cold temperature--A temperature not exceeding 8 degrees Celsius (46 degrees Fahrenheit). A refrigerator is a cold place in which the temperature maintained thermostatically between 2 degrees and 8 degrees Celsius (36 degrees and 46 degrees Fahrenheit);]~~

~~*[(III)* cool--A temperature between 8 degrees and 15 degrees Celsius (46 degrees and 59 degrees Fahrenheit). An article for which storage in a cool place is directed may, alternatively, be stored in a refrigerator unless otherwise specified on the labeling; and]~~

~~*[(IV)* controlled room temperature--A temperature maintained thermostatically between 15 degrees and 30 degrees Celsius (59 degrees and 86 degrees Fahrenheit).]~~

(ii) Beyond-use dating.

(I) Beyond-use dates for compounded sterile preparations shall be assigned based on professional experience, which shall include careful interpretation of appropriate information sources for the same or similar formulations.

(II) Beyond-use dates for compounded sterile preparations that are prepared strictly in accordance with manufacturers' product labeling must be those specified in that labeling, or from appropriate literature sources or direct testing.

(III) Beyond-use dates for compounded sterile preparations that lack justification from either appropriate literature sources or by direct testing evidence must be assigned as described in Chapter 797, Pharmaceutical Compounding--Sterile Preparations of the USP/NF.

(6) - (13) (No change.)

(e) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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CHAPTER 305. EDUCATIONAL REQUIREMENTS

22 TAC §305.2

The Texas State Board of Pharmacy proposes amendments to §305.2, concerning Pharmacy Technician Training Programs. The amendments, if adopted, clarify that individuals enrolled in pharmacy technician training programs must be registered with the Board prior to working in a pharmacy as part of the experiential component of the training program.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that pharmacy technicians and pharmacy technician trainees are registered with the Board prior to working in a pharmacy. There is no fiscal impact for individuals if the individual is registering as a pharmacy technician trainee. Individuals registering as pharmacy technicians are required to pay an initial registration fee of $59. The effect on large, small or micro-businesses (pharmacies) will be the same as the economic cost to an individual, if the pharmacy chooses to pay the individual fee.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., July 21, 2008.

The amendments are proposed under §§551.002, 554.002, and 554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.002 as authorizing the agency to adopt rules regarding the training, qualifications, and employment of pharmacy technicians. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§305.2. Pharmacy Technician Training Programs.

(a) - (b) (No change.)

(c) Students enrolled in a Board-approved pharmacy technician training programs. A student enrolled in a Board-approved pharmacy technician training program must be registered as a pharmacy technician trainee or pharmacy technician prior to [~~may be a pharmacy technician trainee for the duration of their enrollment when~~] working in a pharmacy as part of the experiential component of the Board-approved pharmacy technician training program.

(d) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 309. SUBSTITUTION OF DRUG PRODUCTS

22 TAC §309.1, §309.3

The Texas State Board of Pharmacy proposes amendments to §309.1, concerning Objective, and §309.3, concerning Generic Substitution. The amendments, if adopted, establish the procedures for practitioners to prohibit substitution based on the manufacturer of the brand or generic product.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will be to provide procedures for practitioners to prohibit substitution based on the manufacturer of the brand or generic product. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with the sections.

A public hearing to receive comments on the proposed amendments will be held at 9:00 a.m. on Tuesday, August 5, 2008, at the Health Professions Council Board Room, William P. Hobby Building, 333 Guadalupe Street, Tower II, Room 225, Austin, Texas 78701. Persons planning to present comments to the Board are asked to provide a written copy of their comments prior to the hearing or bring 20 copies to the hearing. Written comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., July 21, 2008.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board

interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§309.1. Objective.

These sections: [govern the substitution of lower-priced generically equivalent drug products for certain brand name drug products.]

(1) govern the substitution of lower-priced generically equivalent drug products for certain brand name drug products; and

(2) establish the procedures for practitioners to prohibit substitution based on the manufacturer of the brand or generic product.

§309.3. Generic Substitution.

(a) General requirements. In accordance with Chapter 562 of the Act, a pharmacist may dispense a generically equivalent drug product if:

[(1) In accordance with Chapter 562 of the Act, a pharmacist may dispense a generically equivalent drug product if:]

(1) [(A)] the generic product costs the patient less than the prescribed drug product;

(2) [(B)] the patient does not refuse the substitution; and

(3) [(C)] the practitioner does not certify on the prescription form that a specific prescribed brand is medically necessary as specified in a dispensing directive described in subsection (c) of this section.

[(2) If the practitioner has prohibited substitution through a dispensing directive in compliance with subsection (c) of this section, a pharmacist shall not substitute a generically equivalent drug product unless the pharmacist obtains verbal or written authorization from the practitioner and notes such authorization on the original prescription drug order.]

(b) (No change.)

(c) Dispensing directive.

(1) General requirements. The following is applicable to dispensing directives outlines in this subsection.

(A) When a prescription is issued for a brand name product that has no generic equivalent product, the pharmacist must dispense the brand name product. If a generic equivalent product becomes available, a pharmacist may substitute the generically equivalent product unless the practitioner has specified that the on the initial prescription that the brand name product is medically necessary.

(B) If a practitioner issues a prescription for a generic drug and specifies a particular manufacturer or that the same manufacturer always be dispensed, the pharmacist may not refill the prescription with another manufacturer's product without authorization, from the prescribing practitioner.

(C) If the practitioner has prohibited substitution through a dispensing directive in compliance with this subsection, a pharmacist shall not substitute a generically equivalent drug product unless the pharmacist obtains verbal or written authorization from the practitioner, notes such authorization on the original prescription drug order, and notifies the patient in accordance with §309.4 of this title (relating to Patient Notification).

(2) [(1)] Written prescriptions.

(A) A practitioner may prohibit the substitution of a generically equivalent drug product for a brand name drug product by writing across the face of the written prescription, in the practitioner's own handwriting, the phrase "brand necessary" or "brand medically necessary."

(B) The dispensing directive shall:

(i) be in a format that protects confidentiality as required by the Health Insurance Portability and Accountability Act of 1996 (29 U.S.C. Section 1181 et seq.) and its subsequent amendments; and

(ii) comply with federal and state law, including rules, with regard to formatting and security requirements.

(C) The dispensing directive specified in this paragraph may not be preprinted, rubber stamped, or otherwise reproduced on the prescription form.

(D) A practitioner may prohibit substitution on a written prescription only by following the dispensing directive specified in this paragraph. Two-line prescription forms, check boxes, or other notations on an original prescription drug order which indicate "substitution instructions" are not valid methods to prohibit substitution, and a pharmacist may substitute on these types of written prescriptions.

(3) [(2)] Verbal Prescriptions.

(A) If a prescription drug order is transmitted to a pharmacist orally, the practitioner or practitioner's agent shall prohibit substitution by specifying "brand necessary" or "brand medically necessary." The pharmacists shall note any substitution instructions by the practitioner or practitioner's agent, on the file copy of the prescription drug order. Such file copy may follow the one-line format indicated in subsection (b)(1) of this section, or any other format that clearly indicates the substitution instructions.

(B) If the practitioner's or practitioner's agent does not clearly indicate that the brand name is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(C) To prohibit substitution on a verbal prescription reimbursed through the medical assistance program specified in 42 C.F.R., §447.331:

(i) the practitioner or the practitioner's agent shall verbally indicate that the brand is medically necessary; and

(ii) the practitioner shall mail or fax a written prescription to the pharmacy which complies with the dispensing directive for written prescriptions specified in paragraph (1) of this subsection within 30 days.

(4) [(3)] Electronic prescription drug orders.

(A) To prohibit substitution, the practitioner or practitioner's agent shall note "brand necessary" or "brand medically necessary" in the electronic prescription drug order.

(B) If the practitioner or practitioner's agent does not clearly indicate in the electronic prescription drug order that the brand is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(C) To prohibit substitution on an electronic prescription drug order reimbursed through the medical assistance program specified in 42 C.F.R., §447.331, the practitioner shall fax a copy of the original prescription drug order which complies with the requirements of a written prescription drug order specified in paragraph (1) of this subsection within 30 days.

(5) [(4)] Prescriptions issued by out-of-state, Mexican, Canadian, or federal facility practitioners.

(A) The dispensing directive specified in this subsection does not apply to the following types of prescription drug orders:

(i) prescription drug orders issued by a practitioner in a state other than Texas;

(ii) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(iii) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(B) A pharmacist may not substitute on prescription drug orders identified in subparagraph (A) of this paragraph unless the practitioner has authorized substitution on the prescription drug order. If the practitioner has not authorized substitution on the written prescription drug order, a pharmacist shall not substitute a generically equivalent drug product unless:

(i) the pharmacist obtains verbal or written authorization from the practitioner (such authorization shall be noted on the original prescription drug order); or

(ii) the pharmacist obtains written documentation regarding substitution requirements from the State Board of Pharmacy in the state, other than Texas, in which the prescription drug order was issued. The following is applicable concerning this documentation.

(I) The documentation shall state that a pharmacist may substitute on a prescription drug order issued in such other state unless the practitioner prohibits substitution on the original prescription drug order.

(II) The pharmacist shall note on the original prescription drug order the fact that documentation from such other state board of pharmacy is on file.

(III) Such documentation shall be updated yearly.

(d) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 7. CLEAN AIR INTERSTATE RULE

30 TAC §§101.502, 101.504, 101.506, 101.508

The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to §§101.502, 101.504, 101.506, and 101.508.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of this Clean Air Interstate Rule (CAIR) revision is to incorporate legislative changes made during the 80th Texas Legislature, 2007, as prescribed by Senate Bill (SB) 1672 and federal rule revisions that the EPA has promulgated since Texas adopted the states initial CAIR rules on July 12, 2006. Additionally, grammatical and formatting changes are being proposed to conform with Texas Register and commission standards.

On May 12, 2005, the EPA promulgated CAIR to assist nonattainment areas in downwind states in achieving compliance with the national ambient air quality standards (NAAQS) for particulate matter less than or equal to 2.5 microns ($PM_{2.5}$) and eight-hour ozone. Twenty-eight eastern states and the District of Columbia were identified as upwind contributors to the nonattainment of the $PM_{2.5}$ and eight-hour ozone NAAQS prompting the requirement for the reduction in emissions of sulfur dioxide (SO_2) and/or oxides of nitrogen (NO_x). Twenty-three states, including Texas, and the District of Columbia were found to contribute to the downwind nonattainment of the $PM_{2.5}$ NAAQS and are required to make reductions in annual emissions of SO_2 and NO_x.

The 79th Texas Legislature, 2005, enacted House Bill (HB) 2481, §2 (codified at Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.0173), requiring Texas to participate in the EPA-administered interstate cap and trade program through the incorporation by reference of the CAIR model trading rule. HB 2481 also provided specific direction for the methodology to be used in allocating the NO_x trading budget provided to Texas, identified an amount of CAIR NO_x allowances to be set aside for new sources, and specified that reductions associated with CAIR would only be required from new and existing electric generating units (EGUs) and not from other sources of SO_2 and NO_x emissions.

In 2007, the 80th Texas Legislature passed SB 1672 that directs the TCEQ to incorporate federal CAIR changes that the EPA has finalized since the initial adoption of the CAIR rules on July 12, 2006, and revise the NO_x allocation methodology as prescribed by SB 1672. SB 1672 revises the number of minimum periods specified for NO_x allocation adjustments that was directed by HB 2481. HB 2481 revised the baseline heat input of existing units to reflect the average of the three highest amounts of the units total converted control period heat input from control periods one through five of the previous seven control periods. However, the five-year period did not provide adequate time to accommodate the EPA's requirement of providing allocations to them approximately four years in advance. SB 1672 changed the number of control periods from seven to nine and shifted the initial allocation update from 2016 to 2018. Therefore, beginning with the 2018 control period, and for the control period beginning every five-years after 2018, each existing unit's baseline heat input will be adjusted to reflect the average of the three highest amounts

of the unit's total converted control period heat input from control periods one through five of the previous nine control periods.

Because of the change in control periods for adjusting baseline heat input, for the 2016 and 2017 control periods new units with five or more consecutive years of operation will be eligible to receive their CAIR NO_x allocation from the general NO_x trading budget on a modified output basis. This is consistent with how new units are handled for the 2015 control period under the federal CAIR program. However, beginning in the 2018 control period, new units with five or more years of operation will be eligible to receive their CAIR NO_x allowances allocation from the general NO_x trading budget on a modified output basis only during the baseline adjustment control periods.

SB 1672 also omits the reference dates of the federal CAIR adoption that were specified in HB 2481 from the 79th Texas legislative session. This change will enable the commission to make subsequent changes as dictated by federal rule change for CAIR.

The proposed rule revision also incorporates revisions to the federal CAIR model trading rules. The EPA adopted revisions to 40 Code of Federal Regulations (CFR) Part 96 Subpart AA - Subpart II and Subpart AAA - Subpart III on April 28, 2006. In the April 28, 2006, revisions, the EPA changed the compliance dates for companies to submit a request for allowances from the new unit set-aside from July 1 to May 1 of the control period. The EPA also revised the time to request allowances from the compliance pool from July 1, 2009, to May 1, 2009. For additional information regarding these revisions, please review the EPA final rule, published in the Federal Register at 71 Fed Reg. 82 on April 28, 2006, available online at *www.epa.gov/fedrgstr/.*

On January 24, 2008, the EPA adopted revisions to 40 CFR Parts 72 and 75 that modify existing requirements for sources affected by CAIR. The revisions include changes implemented by the EPA's Clean Air Markets Division in its data system in order to utilize the latest modern technology for submittal of data by affected sources. The EPA also adopted revisions to require that individuals performing emissions testing or Continuous Emissions Monitoring System (CEMS) performance evaluations must comply with American Society for Testing and Materials (ASTM) D7036-04 "Standard Practice for Competence of Air Emission Testing Bodies." The ASTM standard sets minimum requirements for demonstrating that an air emission testing bodies is competent to perform testing. For additional information regarding these revisions, please review the EPA final rule, published in the Federal Register at 73 Fed Reg. 16 on January 24, 2008, available online at *www.epa.gov/fedrgstr/.*

Currently, the federal CAIR is being reviewed by the District of Columbia (D.C.) Circuit Court of Appeals. Various states, industry groups, and environmental groups challenged several aspects of the federal CAIR, including whether the EPA improperly included West Texas in the CAIR. The litigation treats West Texas as the counties west of the roughly north-south corridor formed by Interstates 35 and 37. Those cases were consolidated as *State of North Carolina v. EPA,* No. 05-1244, in the D.C. Circuit Court of Appeals. The court heard oral argument in the case on March 25, 2008. If a final court decision determines that West Texas and/or El Paso Region sources should not have been included in CAIR, then both the CAIR and these rules that implement CAIR will need to be modified.

TCAA, §382.0173(d) directs the commission to take all reasonable and appropriate steps to exclude the West Texas Region and El Paso Region from CAIR and to promptly amend these rules to incorporate any resulting exclusions. The commission solicits comment on how best to effectuate any exclusion of any portion of Texas from the implementation of CAIR in Texas, should a final court decision overturn the inclusion of West Texas Region and/or El Paso Region sources in the federal CAIR. The commission specifically requests comment on whether to effectuate any exclusion as part of this rulemaking should such a final court decision be rendered prior to the commission's final action on this proposal.

SECTION BY SECTION DISCUSSION

SUBCHAPTER H, EMISSIONS BANKING AND TRADING

DIVISION 7, CLEAN AIR INTERSTATE RULE

Grammatical and formatting changes have been made throughout the proposal to conform to Texas Register and agency standards.

Section 101.502, Clean Air Interstate Rule Trading Program

The proposed revision to §101.502 updates the reference to the adoption date of October 19, 2007, effective November 19, 2007, for 40 CFR Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III.

Section 101.504 Timing Requirements for Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations

The proposed revisions to §101.504 revise the deadlines the executive director must submit to the EPA the CAIR NO_x allowance allocations for each CAIR NO_x unit subject to this division in order to comply with the minimum lead time of three years provided under 40 CFR 51.123(o)(2)(ii). The deadline to submit CAIR NO_x allocations for 2016 will be revised to October 31, 2012. Beginning in control period 2017 and each control period thereafter, the CAIR NO_x allowances allocations must be submitted to the EPA 38 months prior to the beginning of the applicable control period.

Section 101.506, Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations

The proposed revisions to §101.506 describe the methodology to be used in distributing CAIR NO_x allowances, in tons, for each CAIR NO_x unit subject to this division. Beginning with the 2018 control period, and for the control period beginning every five years thereafter, the baseline heat input for units commencing operation prior to January 1, 2001, will be adjusted to reflect the average of the three highest amounts of the unit's control period heat input, adjusted for fuel type, from control periods one through five of the previous nine control periods.

For units commencing operation on or after January 1, 2001, for control periods 2015, 2016, and 2017, units operating each calendar year for a period of five or more consecutive years will be eligible to receive their CAIR NO_x allowance allocation from the general NO_x trading budget on a modified output basis. The baseline heat input will be the average of the three highest amounts of the unit's total converted control period heat input from the first five years of operation.

The proposed revisions also require the CAIR designated representative for units that commence operation on or after January 1, 2001, and that have not established a historical baseline heat input in accordance with §101.506(b)(2) or (3), to submit a request for a CAIR NO_x allowance allocation from the new unit set-aside on or before May 1 of the first control period for which

the request is being made and after the date that the CAIR NO_x unit commences commercial operation.

The proposed revision also requires the gross electrical output of the generator or generators served by the unit and total heat energy of any steam produced by the unit to be submitted in writing to the executive director by the latter of May 1, 2011, or May 1 of the control period immediately following the unit's fifth consecutive year of commercial operation.

Section 101.508, Compliance Supplement Pool

Proposed revisions to §101.508 require the CAIR designated representative to submit to the executive director by May 1, 2009, a request for an allocation of CAIR NO_x allowances from the compliance supplement pool in an amount not to exceed the sum of the CAIR NO_x unit's emission reductions, in tons, during 2007 and 2008, that were not necessary to comply with any state or federal emission limitation applicable during those years.

Proposed revisions also require the CAIR designated representative to submit to the executive director by May 1, 2009, a request for an allocation of CAIR NO_x allowances from the compliance supplement pool in an amount not to exceed the minimum amount of CAIR NO_x allowances necessary to remove the risk to the reliability of electricity supply.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The agency will implement the proposed rules utilizing current resources. Local governments that own or operate EGUs may pay additional monitoring and testing costs, but these additional costs are not expected to be significant.

The proposed rules implement the provisions of SB 1672, which allow the agency to comply with changes made to the federal CAIR by the EPA. Specifically, SB 1672 expands the number of control periods that are used to calculate the baseline, which in turn is used to calculate the heat input of a unit from seven to nine years. The baseline would govern the amount of NO_x that would be permissible under CAIR. SB 1672 also requires the agency to implement other CAIR provisions that the EPA finalized after SB 1672 was passed. These provisions include: an extension of the deadline that companies must comply with for submitting their request for NO_x emission allowances; and additional testing and monitoring options that EGUs can use to measure and report these emissions. The EPA has also mandated that those performing CEMS evaluations and stack testing comply with ASTM D7036-04 requirements so that they can demonstrate competence in performing these monitoring tasks. The proposed rules will apply to any stationary, fossil-fuel-fired boiler or combustion turbine serving at any time a generator with a nameplate capacity of more than 25 megawatts of electricity (MWe) that produces electricity for sale. It is estimated that there may be as many as 400 of these types of machines that fit the criteria governed by the proposed rule and the federal statute. Staff estimates that approximately 48 of these type boilers or combustion turbines are owned by local governments operating EGUs, and approximately 352 are thought to be owned by large businesses operating EGUs.

The proposed rules, which implement EPA requirements, will require that companies performing CEMS evaluations and stack testing comply with ASTM D7036-04 requirements. The EPA has estimated that compliance with ASTM D7036-04 requirements may require a company planning to test for CAIR compliance pay as much as $100 per year to test its ability to comply with ASTM D7036-04 standards and a one-time cost of about $4,000 to establish a quality CAIR monitoring program. A testing company is expected to spread these costs to all the EGUs that choose the company to perform the needed CEMS evaluations and stack testing, and no one EGU, including those owned by local governments, is expected to experience significant cost increases as a result of the proposed rules.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state and federal laws and increased environmental protection due to the reduction of NO_x and SO_2 emissions from stationary sources at affected EGUs.

Approximately 352 of the estimated 400 stationary sources governed by the proposed rule are thought to be owned by large businesses operating EGUs. An EGU will be able to contract a company meeting required technical standards from any of over 240 national and international testing companies, and as many as 19 of these companies may be located in Texas. Most testing companies are thought to be small businesses, and the EPA has estimated that the companies will incur some additional costs, although not anticipated to be significant, to comply with ASTM D7036-04 standards. These additional costs, which are found in the COSTS TO STATE AND LOCAL GOVERNMENT section of this preamble, are not expected to have a significant fiscal implication for EGUs owned by large businesses because testing companies are expected to spread increased costs among several customers.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Although staff does not have the data needed to estimate how many of companies that might perform CEMS evaluations and stack testing for CAIR requirements, staff believes that many of them might be small or micro-businesses. EPA has estimated that compliance with ASTM D7036-04 requirements may require a company planning to test for CAIR compliance pay as much as $100 per year to test its ability to comply with ASTM D7036-04 standards and a one time cost of about $4,000 to establish a quality CAIR monitoring program. A testing company can choose whether or not it will incur these certification costs, and if it chooses to perform this service, the company is expected to recover these costs from their customers.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect. In addition, the proposed rule is required by state and federal law in order to protect the environment and public health and safety.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking meets the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking does not, however, meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules are an incorporation by reference of revisions to the federal CAIR. The commission previously adopted rules to incorporate the CAIR, as discussed elsewhere in this preamble The CAIR includes EPA-administered emissions trading programs that will be governed by model rules provided in the CAIR, which states may incorporate by reference. The EPA found that Texas is among several states that contribute significantly to nonattainment of the NAAQS for $PM_{2.5}$ in downwind states. The EPA is requiring these upwind states to revise their SIPs to include control measures to reduce emissions of SO_2 and/or NO_x, which are precursors to $PM_{2.5}$ formation. Reducing upwind precursor emissions will assist downwind $PM_{2.5}$ nonattainment areas to achieve the NAAQS in a more equitable, cost-effective manner than if those areas implemented local emissions reductions alone. The EPA has specified the amount of each state's required reductions, but each state has flexibility to choose the measures by which it achieves them. If states choose to control EGUs, then they must establish a budget or cap for those sources. The CAIR defines the EGU budgets for the affected states if the states choose to control only EGUs or if they choose to control other sources to achieve some or all of their reductions. States may adopt the CAIR NO_x model allowance allocation methodology or choose an alternative method to allocate the state budget of NO_x emissions allowances to sources in the state.

Specifically, the proposed rulemaking would incorporate by reference revisions to the CAIR model emissions trading rules located in 40 CFR Part 96, Subpart AA - Subpart II, and Subpart AAA - Subpart III. In addition, the rulemaking proposes revisions to an alternative NO_x allowance allocation methodology for Texas CAIR NO_x sources in lieu of the model rule methodology in 40 CFR Part 96, Subpart EE. The proposed rulemaking fulfills the requirements of SB 1672, enacted by the 80th Legislature, to incorporate CAIR by reference, including the five subsequent rule revisions that the EPA has promulgated to CAIR since Texas adopted the initial CAIR SIP revision on July 12, 2006, as well as revisions to the NO_x allocation methodology as prescribed by SB 1672. SB 1672 relates to correcting the number of minimum periods specified for NO_x allocation allowance adjustments that were directed by HB 2481. HB 2481 revised the baseline of existing units by reviewing heat-input data every five years by looking back at the three highest years of the previous seven years. However, the five-year period did not provide adequate time to accommodate the EPA's requirement of providing allocations to them approximately four years in advance of the applicable period. Therefore, the number of control periods was changed from seven to nine in SB 1672, and the allocation update was shifted from 2016 to 2018.

The incorporation of revisions to CAIR and the changes resulting from SB 1672 will allow the CAIR to continue to be implemented in Texas, in accord with the state statutory requirements. The proposed incorporation of the federal rule is intended to protect the environment and to reduce risks to human health and safety from environmental exposure by reducing NO_x and SO_2 emissions from upwind states so that downwind states may reach attainment of the NAAQS for $PM_{2.5}$. As discussed elsewhere in this preamble, the proposed revisions are not expected to impose significant costs on regulated entities. While continued implementation of the CAIR is intended to protect human health and the environment, it may adversely affect in a material way sources in the state that fall under the applicability requirements in the federal rule. Cost and benefits of the revisions to CAIR were analyzed by the EPA during the federal notice and comment rulemaking for the CAIR. CAIR is a required federal program, and the ability of states to modify its requirements is limited.

The proposed rulemaking would implement requirements of the federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410(a)(2)(D), each SIP must contain adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment of the NAAQS in any other state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. Additionally, states have further obligations under 42 USC, §7410(a)(2)(D), to address interstate transport of pollutants that contribute significantly to nonattainment in, or interfere with maintenance by, another state. In the CAIR, the EPA found that 28 states and the

District of Columbia contribute significantly to nonattainment of the $PM_{2.5}$ or eight-hour ozone NAAQS in downwind areas. The EPA is requiring these upwind states to revise their SIPs to include control measures to reduce emissions of SO_2 and/or NO_x, with limited flexibility. Adoption of the federal CAIR, including revisions and participation in its emissions cap and trade approach for annual SO_2 and NO_x emissions to reduce downwind $PM_{2.5}$ is the method the state has chosen to achieve those reductions in a flexible and cost-effective manner.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation."*Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue , 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the proposed rulemaking is to protect the environment and to reduce risks to human health by adoption of the revisions to the federal CAIR by reference in addition to changes resulting from SB 1672. The proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Finally, this proposed rulemaking was not developed solely under the general powers of the agency, but is required by THSC, TCAA, §382.0173. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because although the proposed rulemaking meets the definition of a "major environmental rule," it does not meet any of the four applicability criteria for a major environmental rule.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is to incorporate by reference revisions to the federal CAIR emissions trading rules located in 40 CFR Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III, and to incorporate legislative changes during the 80th Texas Legislature as prescribed by Senate Bill (SB) 1672. In 2007, the 80th Texas Legislature passed SB 1672 that allows the TCEQ to incorporate federal CAIR changes that the EPA has finalized since the initial adoption of the CAIR rules on July 12, 2006, and revise the NO_x allocation methodology as prescribed by SB 1672. SB 1672 revises the number of minimum periods specified for NO_x allowance allocation adjustments that was directed by HB 2481, as discussed elsewhere in this preamble. Additionally, EPA promulgated several changes to the federal CAIR, as discussed elsewhere in this preamble. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response

to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The EPA promulgated the CAIR rule, and revisions to the CAIR, to reduce SO_2 and NO_x emissions from upwind states so that downwind states may reach attainment of the NAAQS for $PM_{2.5}$. The proposed rules will enable Texas to implement the federal emissions budget and trading program and impose its requirements on new and existing fossil fuel-fired electric utility units, ultimately ensuring reductions of SO_2 and NO_x emissions. The action will specifically advance the health and safety purpose by reducing $PM_{2.5}$ levels through an emissions cap and gradual reductions in emissions of SO_2 and NO_x. The rules specifically target a category of sources with significant SO_2 and NO_x emissions, and through the cap and trade program support cost-effective control strategies. Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and the commission rules in 30 Texas Administrative Code (TAC) Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), concerning Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants are authorized and the proposed new rules will maintain at least the same level of or increase the level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking action complies with 40 CFR Part 51, concerning Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The requirements of 42 USC, §7410 are applicable requirements of 30 TAC Chapter 122. Facilities that are subject to the Federal Operating Permit Program will be required to obtain, revise, reopen, and renew their federal operating permits as appropriate in order to include CAIR.

ANNOUNCEMENT OF HEARINGS

Public hearings for the proposed rulemaking and SIP revision have been scheduled in Fort Worth on July 15, 2008, at 2:00 p.m. at the Texas Commission on Environmental Quality Regional Office, located at 2309 Gravel Drive; in Austin on July 16, 2008, at 2:00 p.m. in Building C, Room 131E at the Texas Commission on Environmental Quality complex, located at 12100 Park 35 Circle; and in Houston on July 17, 2008, at 2:00 p.m. in Conference Room B at Houston-Galveston Area Council, located at 3555 Timmons Lane, Number 120.

The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during each hearing; however, commission staff members will be available to discuss the proposal 30 minutes before each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Kristin Smith, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2007-053-101-EN. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. Comments must be received by July 18, 2008. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Brandon Greulich, Air Quality Planning Section, (512) 239-4904.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning emission inventory; §382.016, concerning Monitoring Requirements; §382.0173, concerning adoption of rules regarding certain state implementation plan requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq.,* which requires states to include in their adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute

significantly to nonattainment, or interfere with maintenance of, the national ambient air quality standard in any other state.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0173, and 382.054; and FCAA, 42 USC, §§7401 *et seq.*

§101.502. Clean Air Interstate Rule Trading Program.

(a) The commission incorporates by reference, except as specified in this division, the provisions of 40 Code of Federal Regulations (CFR) Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III (as amended through October 19, 2007 (72 FR 59190)) [~~May 12, 2005 (70 FR 25162))~~] for purposes of implementing the Clean Air Interstate Rule (CAIR) trading programs for annual emissions of oxides of nitrogen (NO_x) and sulfur dioxide to meet the requirements of Federal Clean Air Act, §110(a)(2)(D).

(b) (No change.)

(c) The methodologies and procedures for determining and recording each subject source's CAIR NO_x [~~Clean Air Interstate Rule oxides of nitrogen~~] allowance allocation in 40 CFR Part 96, Subpart EE are replaced by the requirements of this division.

§101.504. Timing Requirements for Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.

(a) The executive director shall submit to the United States Environmental Protection Agency (EPA) the Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO_x) allowance allocations determined in accordance with §101.506(c) of this title (relating to Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations) by the following dates:

(1) - (2) (No change.)

(3) October 31, 2012, [~~2014,~~] for the 2016 control period; and

(4) 38 [~~14~~] months prior to the beginning of each applicable control period for the control period beginning in 2017 and for each control period thereafter.

(b) - (d) (No change.)

§101.506. Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.

(a) For units commencing operation before January 1, 2001:

(1) (No change.)

(2) for the control period beginning January 1, 2018 [~~2016~~], and for the control period beginning every five years thereafter, the baseline heat input must be adjusted to reflect the average of the three highest amounts of the unit's adjusted control period heat input from control periods one through five of the preceding nine [~~seven~~] control periods with the adjusted control period heat input for each year calculated as follows:

(A) - (C) (No change.)

(b) For units commencing operation on or after January 1, 2001:

(1) (No change.)

(2) for the control periods [~~period~~] beginning January 1, 2015, January 1, 2016, and January 1, 2017, for units operating each calendar year during a period of five or more consecutive years, the baseline heat input is the average of the three highest amounts of the unit's total converted control period heat input over the first such five years. The converted control period heat input for each year is calculated as follows:

(A) - (C) (No change.)

(3) for the control period beginning January 1, 2018, [~~2016,~~] and for the control period beginning every five years thereafter, for units operating each calendar year during a period of five or more consecutive years, the baseline heat input must [~~shall~~] be adjusted to reflect the average of the three highest amounts of the unit's converted control period heat input from control periods one through five of the preceding nine [~~seven~~] control periods. The converted control period heat input for each year is calculated as follows:

(A) - (C) (No change.)

(c) (No change.)

(d) For units commencing operation on or after January 1, 2001, and that have not established a baseline heat input in accordance with subsection (b)(2) or (3) of this section, CAIR NO_x allowances must be allocated according to the following.

(1) (No change.)

(2) To receive a CAIR NO_x allowance allocation from the new unit set-aside, the CAIR designated representative shall submit to the executive director a written request on or before May 1 [~~July 1~~] of the first control period for which the CAIR NO_x allowance allocation is requested and after the date that the CAIR NO_x unit commences commercial operation.

(3) (No change.)

(4) The executive director shall review each CAIR NO_x allowance allocation request submitted in accordance with this subsection and shall allocate CAIR NO_x allowances for each control period as follows.

(A) (No change.)

(B) On or after May 1 [~~July 1~~] of the control period, the executive director shall determine the sum of all accepted CAIR NO_x allowance allocation requests for the control period.

(C) - (E) (No change.)

(e) - (f) (No change.)

(g) On or before the latter of May 1, 2011, [~~July 1, 2011,~~] or May 1 [~~July 1~~] of the control period immediately following a unit's fifth complete, consecutive year of commercial operation, the CAIR designated representative of a unit establishing a baseline heat input in accordance with subsection (b)(2) or (3) of this section shall submit, on a form specified by the executive director, written certification of the gross electrical output of the generator or generators served by the unit and the total heat energy of any steam produced by the unit during the first five years of commercial operation.

§101.508. Compliance Supplement Pool.

(a) (No change.)

(b) For any CAIR NO_x unit that achieves NO_x emission reductions in 2007 and 2008 that are not necessary to comply with any state or federal emissions limitation applicable during such years, the CAIR designated representative of the unit may request early reduction credits and allocation of CAIR NO_x allowances from the compliance supplement pool under subsection (a) of this section for such early reduction credits, in accordance with the following.

(1) (No change.)

(2) The CAIR designated representative of such CAIR NO_x unit shall submit to the executive director by May 1, 2009, [~~July 1, 2009,~~] a written request for allocation of an amount of CAIR NO_x allowances from the compliance supplement pool not exceeding the sum

of the amounts, in tons, of the unit's NO_x emission reductions in 2007 and 2008 that are not necessary to comply with any state or federal emissions limitation applicable during such years, determined in accordance with 40 CFR Part 96, Subpart HH.

(c) For any CAIR NO_x unit of which [~~whose~~] compliance with the CAIR NO_x emissions limitation for the control period in 2009 would create an undue risk to the reliability of electricity supply during such control period, the CAIR designated representative of the unit may request the allocation of CAIR NO_x allowances from the compliance supplement pool under subsection (a) of this section, in accordance with the following.

(1) The CAIR designated representative of such CAIR NO_x unit shall submit to the executive director by May 1, 2009, [~~July 1, 2009,~~] a written request for allocation of an amount of CAIR NO_x allowances from the compliance supplement pool not exceeding the minimum amount of CAIR NO_x allowances necessary to remove such undue risk to the reliability of electricity supply.

(2) In the request under paragraph (1) [~~subsection (c)(1)~~] of this subsection [~~section~~], the CAIR designated representative of such CAIR NO_x unit shall demonstrate that, in the absence of allocation to the unit of the amount of CAIR NO_x allowances requested, the unit's compliance with CAIR NO_x emissions limitation for the control period in 2009 would create an undue risk to the reliability of electricity supply during such control period. This demonstration must include a showing that it would not be feasible for the owners and operators of the unit to:

(A) - (B) (No change.)

(d) The executive director shall review each request under subsections (b) or (c) of this section submitted by May 1, 2009, [~~July 1, 2009,~~] and shall allocate CAIR NO_x allowances for the control period in 2009 to CAIR NO_x units covered by such request as follows.

(1) - (3) (No change.)

(4) By November 30, 2009, the executive director shall determine, and submit to the EPA, the allocations under paragraph (2) or (3) of this subsection.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 6, 2008.

TRD-200802911
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 239-0177

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CHAPTER 321. CONTROL OF CERTAIN ACTIVITIES BY RULE
SUBCHAPTER P. RECLAIMED WATER PRODUCTION FACILITIES

30 TAC §§321.301, 321.303, 321.305, 321.307, 321.309, 321.311, 321.313, 321.315, 321.317, 321.319, 321.321, 321.323, 321.325

The Texas Commission on Environmental Quality (commission) proposes new §§321.301, 321.303, 321.305, 321.307, 321.309, 321.311, 321.313, 321.315, 321.317, 321.319, 321.321, 321.323, and 321.325.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The commission received a petition with a request to initiate rulemaking and proposed rule language to authorize the construction and operation of reclaimed water production facilities. On July 25, 2007, the commission granted the petition and directed the executive director to prepare a proposed rule. This proposed rule would provide a streamlined process to authorize the construction and operation of reclaimed water production facilities at a location other than a permitted domestic wastewater treatment facility. These reclaimed water production facilities must currently be authorized through the same permitting process as wastewater treatment facilities that are authorized to discharge or land apply treated effluent.

This rule would apply to permitted wastewater treatment facility owners who wish to produce reclaimed water at a site other than the permitted domestic wastewater treatment facility. The rule would give them a streamlined process to obtain authorization to construct and operate reclaimed water production facilities. These facilities would be located near reclaimed water users and would save the cost of transporting or piping reclaimed water from the permitted wastewater treatment facility to these users.

SECTION BY SECTION DISCUSSION

Proposed new §321.301, Purpose and Applicability, explains that the purpose of the proposed rule is to provide a mechanism for owners of domestic wastewater treatment facilities to treat wastewater closer to reclaimed water users. The applicability portion provides that the owner of the reclaimed water production facility is required to be the same person as the owner of the permitted domestic wastewater treatment facility. This requirement ensures that there is no opportunity for the operation of the reclaimed water production facility to interfere with the operation of the permitted wastewater treatment facility. The applicability also provides that the authorization is automatically cancelled if the wastewater discharge permit is not in effect. The domestic wastewater treatment facility must be authorized for the treatment and disposal of domestic wastewater since reclaimed water will be sent through the collection system to the domestic wastewater treatment facility during times when there is no demand from the reclaimed water user.

Proposed new §321.303, Definitions, incorporates, by reference, the definitions in 30 TAC Chapter 210, Use of Reclaimed Water, 30 TAC Chapter 305, Consolidated Permits, and includes definitions for specific terms that apply to this subchapter. The definitions section ensures that the regulated community and the public are aware of the specific terminology used in this subchapter.

Proposed new §321.305, General Requirements, provides that the applicant must have a domestic wastewater permit and the reclaimed water production facility authorization does not alter the permitted flow or effluent limits of the permitted domestic wastewater treatment facility. The flow or effluent limits of a permitted wastewater facility may be changed only by amending the permit. In addition, the applicant is required to have an authorization to reuse reclaimed water or apply for authorization concurrently under Chapter 210. The applicant must have authorization for the use of the reclaimed water for the reclaimed water production facility authorization to be useful.

Proposed new §321.307, Restrictions, prohibits the owner of a reclaimed water production facility from accepting any trucked or hauled wastes and from discharging wastewater or pollutants into water in the state. These provisions will prevent operational problems at the facility and will protect the quality of the reclaimed water, human health, and the environment. The proposed rule also prohibits the reclaimed water production facility from exceeding the hydraulic capacity or being authorized at a flow rate that could cause interference with the domestic wastewater treatment facility. This requirement ensures that the permitted wastewater treatment facility is able to continue to operate in a manner that protects human health and the environment.

Proposed new §321.309, Application Requirements, includes requirements for the application for reclaimed water production facilities so that the executive director has all the information necessary to evaluate the application and requires the application complies with other commission rules.

Proposed new §321.311, Application Review, describes the process the executive director will use to: review the application; notify the applicant to publish notice (if required); and return the application if insufficient information is submitted by the applicant.

Proposed new §321.313, Authorization, includes specific requirements, including, design criteria, a prohibition of issuing an authorization to applicants with a poor compliance history rating, and provisions for filing a motion to overturn the executive director's final action on an authorization. The design criteria ensure that the facility is designed and constructed to protect human health and the environment over the life span of the facility. Applicants with poor compliance histories may not be authorized under this streamlined process; however, they may apply for an individual domestic wastewater permit to authorize the reclaimed water production facility. The motion to overturn provides a mechanism for the applicant, public interest counsel or other person to request the commission to review a reclaimed water production facility authorization.

Proposed new §321.315, Design Requirements, requires reclaimed water production facilities to meet the design criteria according to the requirements of 30 TAC Chapter 317, Design Criteria for Sewage Systems, with minor exceptions, and to convey all wastewater to the domestic wastewater treatment facility when not in operation. The rule requires reclaimed water production facilities to be designed and operated to minimize odor.

Proposed new §321.317, Buffer Zone Requirements, includes general site selection requirements to protect groundwater and surface water and specific requirements relating to unsuitable site characteristics. The proposed rule includes two options for meeting buffer zone requirements: enhanced buffer zone and standard buffer zone requirements. If the owner requests authorization using the enhanced buffer zone, the reclaimed water production facility must meet one of three buffer zone options: placing the treatment units within a building with a 150-foot buffer zone; placing the treatment units within a building with air exhaust systems and odor control technology with a 50-foot buffer zone; or an extended 300-foot buffer zone. The enhanced buffer zone ensures that under normal operating conditions, odor from the facility should not reach adjoining property. If the owner requests authorization without an enhanced buffer zone designation, the reclaimed water production facility must have a buffer zone of 150 feet from the nearest property line. The applicant may meet these requirements by ownership or by legal restriction of the buffer zone area.

Proposed new §321.319, Public Notice Requirements, includes notice requirements for reclaimed water production facilities that do not meet the enhanced buffer zone designation. These facilities must meet the standard 150-foot buffer zone requirement. The owner of a reclaimed water production facility that meets the enhanced buffer zone designation is not required to publish notice.

Proposed new §321.321, Additional Reclaimed Water Production Facility Requirements, includes operator requirements for the reclaimed water production facility and notification requirements for the applicant. This requirement ensures that the operator of the reclaimed water production facility has the training and knowledge necessary to properly operate the facility. This section also requires the applicant to notify the executive director at least 45 days prior to completion and at least 45 days prior to operation of a reclaimed water production facility. This requirement ensures that the executive director has opportunities to inspect the reclaimed water production facility during construction and prior to operation.

Proposed new §321.323, Enforcement, includes enforcement criteria for reclaimed water production facilities. The rule is consistent with other commission enforcement procedures.

Proposed new §321.325, Fees, includes application fees for reclaimed water production facilities. The proposed rule includes an application fee of $300 and an annual water quality fee of $800 for a constructed facility or $400 for a facility that has not been constructed.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The agency will utilize currently available resources to implement a streamlined authorization process for the construction and operation of reclaimed water production facilities at a site other than a permitted domestic wastewater treatment facility. Other state agencies or local governments that reclaim water for reuse and elect to apply for the proposed authorization are expected to save time in obtaining such authorizations and experience cost savings if they determine a remote reclaimed water production facility is economically advantageous.

The agency has been petitioned to develop a streamlined authorization method to allow regulated entities to construct facilities to reclaim water at sites other than their permitted domestic wastewater treatment facilities. Under current rules, treatment of reclaimed water is only authorized at permitted domestic wastewater treatment facilities. Applying for an authorization of separate reclaimed water treatment facilities under the proposed rules would afford owners of wastewater treatment facilities another wastewater treatment option that could be less expensive and more efficient in reclaiming and using wastewater. However, the proposed authorization would restrict the types of treatment units that can be constructed. In addition, the proposed authorization would impose more stringent buffer zone requirements or enclosing the facility in a structure for odor reduction. For facilities that do not meet these enhanced buffer zone requirements, the proposed rule includes notice requirements to pub-

lish notice and provide an opportunity for public comments and a public meeting.

Authorization and construction of these smaller, separate treatment facilities would allow owners of wastewater treatment facilities to produce reclaimed water closer to sites where the water is needed if stringent criteria are met concerning odor control, and groundwater and surface water protection. The time required to obtain a current wastewater treatment facility permit is approximately 330 days. If an owner can meet the stringent operating criteria of the proposed authorization for a remote treatment facility, an authorization is expected to take 60 to 90 days. Since a remote wastewater treatment facility would allow for closer proximity to users of reclaimed water, owners of these facilities would save the costs of constructing more pipelines and transporting the water to a site where reclaimed water would be used.

State agencies and local governments that reclaim water at permitted wastewater treatment facilities are expected to choose this proposed optional authorization process only if it will reduce their infrastructure, operating, and treatment costs. At least 12 local governments have expressed interest in applying for this type of authorization. The agency would charge a flat application fee of $300 per application and an annual water quality fee. The annual water quality fee would be $400 before construction occurs and $800 after the facility is constructed. Revenue would be deposited to Account 153 - Water Resource Management Account and could be as much as $8,400 in the first year before facilities are constructed if all 12 authorizations are granted. Revenue could range from $4,800 to $9,600 in subsequent years depending on whether all 12 facilities are constructed.

One potential applicant has estimated that construction of a six-mile pipeline through a densely populated area to carry treated domestic wastewater to a site of reuse could cost as much as $10,500,000. In addition, pumping costs have been estimated to be as much as $190,000 per year. If the applicant is authorized to construct a reclaimed water production facility near the site of reuse, it could save money by constructing a facility estimated to cost $2,000,000. Construction savings are estimated to be $8,500,000, and annual operating costs are expected to be less than pumping costs of $190,000. Cost savings will vary greatly among applicants depending on the amount of demand for reclaimed water, characteristics of each project, and each applicant's operating practices.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be the facilitation of reclaimed water usage which may lead to greater use of reclaimed water and less strain on the available groundwater and surface water resources of the state.

The proposed rules offer a streamlined authorization process for reclaimed water production facilities if they meet strict criteria. Applicants are expected to utilize this authorization method only if it becomes economically advantageous to construct and operate these smaller, separate facilities. Businesses that own or operate wastewater treatment facilities at large investor owned utilities and that choose to apply for this authorization of separate, smaller facilities are expected to experience the same savings in construction and operating costs as those experienced by local governments. The amount of savings would vary greatly depending on the amount of demand for reclaimed water and the operating costs of each project.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Small or micro-businesses typically do not own or operate wastewater treatment facilities where there will be a sufficient supply of reclaimed water to make the addition of a separate, smaller treatment facility economically advantageous. If a small or micro-business decides a separate facility would be beneficial, they are expected to experience the same type of cost savings as a large investor owned utility.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are not expected to adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule which 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking would provide owners of domestic wastewater treatment facilities with the ability to construct reclaimed water production facilities to produce reclaimed water at a site other than a permitted domestic wastewater treatment facility as described in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES and SECTION BY SECTION DISCUSSION sections of this preamble. Because the proposed rules are not specifically intended to protect the environment or reduce risks to human health from environmental exposure but to provide an alternative to the current wastewater permitting process, this rulemaking is not a major environmental rule and does not meet any of the four applicability requirements. Because these rules provide an alternative, more cost efficient process for treating wastewater for reuse, they do not result in any new requirements and should not adversely affect in a material way the economy, a sector of the economy, productivity,

competition, or jobs. The commission invites public comment regarding this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates Texas Government Code, Chapter 2007 does not apply to this proposed rule because this action provides owners of domestic wastewater treatment facilities with the ability to construct a wastewater treatment facility at a remote location, provided the owner either owns or has a lease on the land to be used, as described in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES and SECTION BY SECTION DISCUSSION sections of this preamble. Promulgation and enforcement of these proposed rules would be neither a statutory or constitutional taking of private real property. Specifically, the proposed amendments do not affect a landowner's rights in private real property, because this rulemaking action does not burden, restrict, nor limit the owner's rights to property or reduce its value by 25 percent or more beyond which would otherwise exist in the absence of the proposed regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), concerning rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is editorial and procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies. Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on July 15, 2008 at 10:00 a.m. in Room 201S, Building E, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. The commission specifically requests comments relating to incorporating the appropriate provisions requiring the posting of notice signs for reclaimed water production facilities that are required to provide public notice. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-002-321-PR. The comment period closes July 21, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Mary Ann Dimakos Airey, P.E., Wastewater Permitting Section at (512) 239-4521.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.102, which establishes the commission's general authority to carry out its jurisdiction; §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; §5.701 which authorizes the commission to charge fees; §7.002, which authorizes the commission to enforce the TWC; §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.

The proposed new sections would implement TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 5.701, 7.002, 26.011, and 26.027.

§321.301. Purpose and Applicability.

(a) The purpose of this subchapter is to establish authorization procedures, general design criteria, and operational requirements for reclaimed water production facilities and thereby promote the beneficial use of reclaimed water that may be substituted for potable water or raw water.

(b) This subchapter authorizes a reclaimed water production facility to produce reclaimed domestic wastewater at a site other than a permitted domestic wastewater treatment facility.

(c) A reclaimed water production facility authorized according to this subchapter is not required to hold a wastewater discharge permit from the commission, except as provided in §210.5 of this title (relating to Authorization for the Use of Reclaimed Water).

(d) A reclaimed water production facility may be authorized only if the owner of the reclaimed water production facility is also an owner of the associated domestic wastewater treatment facility that is permitted by the commission.

(e) If the wastewater discharge permit for the domestic wastewater treatment facility associated with a reclaimed water production facility expires, lapses, is surrendered, suspended, or revoked, the authorization to operate the reclaimed water production facility is automatically cancelled.

§321.303. Definitions.

All definitions in Texas Water Code, §26.001 and 30 TAC Chapters 210 and 305 of this title (relating to Use of Reclaimed Water, and Consolidated Permits) shall apply to this subchapter and are incorporated

by reference. Specific definitions of words or phrases used in this subchapter are as follows:

(1) Authorization--a written document issued by the commission allowing an owner to construct and operate a reclaimed water production facility in accordance with the provisions of this subchapter.

(2) Reclaimed Water Production Facility--a domestic wastewater treatment facility authorized in accordance with this subchapter that treats municipal wastewater for reuse on an as-needed basis and is located at a different location from the permitted domestic wastewater treatment facility.

(3) Treatment unit--Any apparatus necessary for treating wastewater (e.g., aeration basins, splitter boxes, bar screens, clarifiers, on-site lift stations) located at the reclaimed water production facility.

§321.305. General Requirements.

(a) An applicant for authorization to produce reclaimed water at a reclaimed water production facility must have:

(1) a domestic wastewater permit for a domestic wastewater treatment facility that is located at the terminus of the collection system to which the reclaimed water production facility is or will be connected; and

(2) an authorization to use reclaimed water under Chapter 210 of this title (relating to the Use of Reclaimed Water).

(b) Applications for reclaimed water production facilities and for authorization to beneficially reuse reclaimed water under Chapter 210 of this title may be submitted concurrently.

(c) The authorization of a reclaimed water production facility does not alter the permitted flow or effluent limits of the associated domestic wastewater treatment facility.

§321.307. Restrictions.

(a) A reclaimed water production facility may not discharge wastewater or pollutants into water in the state.

(b) The hydraulic capacity of the reclaimed water production facilities may not individually nor collectively exceed the permitted hydraulic capacity of the associated domestic wastewater treatment facility.

(c) A reclaimed water production facility may not be authorized at a flow rate that could cause interference with the operation of the domestic wastewater treatment facility or a violation of the domestic wastewater treatment facility's permit.

(d) A reclaimed water production facility may not treat or dispose of sludge. All sludge must be conveyed through the collection system to the permitted domestic wastewater treatment facility, treated, and disposed of in accordance with the facility's permit and all applicable rules.

(e) The owner may not accept trucked or hauled wastes at a reclaimed water production facility.

(f) Authorization under this chapter does not convey or alter any property right and does not grant any exclusive privilege.

§321.309. Application Requirements.

(a) An applicant shall comply with the provisions of §§305.43, 305.44, and 305.47 of this title (relating to Who Applies; Signatories to Applications; and Retention of Application Data).

(b) An application for an authorization of a reclaimed water production facility under this subchapter must be made on forms prescribed by the executive director.

(c) An applicant shall submit one original application with attachments to the executive director and one additional copy of the application with attachments to the appropriate regional office. Additional copies may be required as noted in the application.

(d) The application must contain, at a minimum, the following information:

(1) the applicant's name, mailing address, and telephone number;

(2) the wastewater permit number of the associated domestic wastewater treatment facility;

(3) a brief description of the nature of the reclaimed water use;

(4) the signature of the applicant, in accordance with §305.44 of this title;

(5) a copy of a recorded deed or tax records showing ownership, or a copy of a contract or lease agreement between the applicant and the owner of any lands to be used for the reclaimed water production facility;

(6) a copy of the applicant's reuse authorization issued under Chapter 210 of this title (relating to Use of Reclaimed Water), or a copy of a concurrent application;

(7) a preliminary design report for the reclaimed water production facility that includes the design flow, design calculations, the size of the proposed treatment units, a flow diagram, and the proposed effluent quality;

(8) a buffer zone map and report indicating how the reclaimed water production facility will meet buffer zone requirements;

(9) a County General Highway Map (with scale clearly shown) to identify the relative location of the domestic wastewater treatment facility, the main lines of the collection system, and the reclaimed water production facility and at least a one-mile area surrounding the reclaimed water production facility;

(10) one original (remainder in color copies, if required) United States Geological Survey 7.5-minute quadrangle topographic map or an equivalent high quality color copy showing the boundaries of land owned, operated or controlled by the applicant and to be used as a part of the reclaimed water production facility. The map shall extend at least a one-mile beyond the facility boundaries and shall be sufficient to show the following:

(A) each well, spring, and surface water body or other water in the state within the one-mile area; and

(B) the general character of the areas adjacent to the facility, including public roads, towns and the nature of development of adjacent lands such as residential, commercial, agricultural, recreational, and undeveloped.

(11) any other information requested by the executive director.

§321.311. Application Review.

(a) The executive director will review all applications for reclaimed water production facility authorizations for administrative and technical completeness.

(b) If an application has either an administrative or technical deficiency, the applicant will be asked to submit additional information no later than 30 days following the date of the request.

(c) If additional information is not timely submitted or is insufficient to complete the application, the executive director may return the application without refunding the application fee.

(d) If the application is both administratively and technically complete, the executive director will:

(1) proceed with processing the application; and

(2) if applicable, notify the applicant to publish notice according to §321.319 of this title (relating to Public Notice Requirements).

§321.313. Authorization.

(a) The executive director shall not authorize a reclaimed water production facility unless the following conditions are met:

(1) the applicant has obtained plans and specifications approval for the reclaimed water production facility according to the design criteria in §321.315 of this title (relating to Design Requirements); and

(2) the applicant has an authorization according to Chapter 210 of this title (relating to Use of Reclaimed Water).

(b) The executive director shall not authorize a reclaimed water production facility owned or operated by an applicant that has a compliance history rating of poor, as defined by Chapter 60 of this title (relating to Compliance History).

(c) The executive director shall not authorize a reclaimed water production facility that discharges to a domestic wastewater treatment facility that has a compliance history site rating of poor, as defined by Chapter 60 of this title.

(d) The applicant, public interest counsel or other persons may file with the Office of the Chief Clerk a motion to overturn the executive director's final action on an authorization for a reclaimed water production facility under §50.139(a), (b), and (d) - (g) of this title (relating to Motion to Overturn Executive Director's Decision).

§321.315. Design Requirements.

(a) Plans and specifications for a reclaimed water production facility must meet the design criteria and the operation, maintenance, and safety requirements in Chapter 317 of this title (relating to Design Criteria for Sewerage Systems) except for redundant treatment units or processes, including power supplies, if the design incorporates sufficient provisions to ensure the effluent quality meets the required limits in the event of a failure of a power supply or a treatment unit or process.

(b) The reclaimed water production facility must be designed to convey all wastewater to the domestic wastewater treatment facility any time the facility is not in operation.

(c) The reclaimed water production facility must be designed to convey all sludge received or produced by the facility to the domestic wastewater treatment facility. Sludge may be held in an aerated storage vessel for discharge to the collection system if the entire sludge contents are completely discharged at least once within every 24-hour period.

(d) The reclaimed water production facility must be designed and operated to minimize odor and other nuisance conditions.

(e) The following treatment processes and units are prohibited:

(1) unaerated primary treatment units (including Imhoff tanks and primary clarifiers);

(2) trickling filters;

(3) pond or lagoon treatment systems;

(4) flow equalization basins; and

(5) unenclosed screenings storage containers.

§321.317. Buffer Zone Requirements.

(a) A reclaimed water production facility must comply with §309.12 of this title (relating to Site Selection to Protect Groundwater or Surface Water).

(b) A reclaimed water production facility must comply with §309.13(a) - (d) of this title (relating to Unsuitable Site Characteristics).

(c) A reclaimed water production facility that does not qualify for an enhanced buffer zone designation must locate each treatment unit at least 150 feet from the nearest property line.

(d) To qualify for an enhanced buffer zone designation, a reclaimed water production facility must comply with one of the following buffer zone requirements:

(1) A treatment unit not located in a building may not be located closer than 300 feet to the nearest property line;

(2) A treatment unit located within an enclosed building that is not equipped with exhaust air systems and odor control technology may not be located closer than 150 feet of the nearest property line; or

(3) A treatment unit located within an enclosed building equipped with exhaust air systems and odor control technology may not be located closer than 50 feet of the nearest property line.

(e) An applicant must own or have sufficient property interest to the land necessary to meet the buffer zone requirements so that residential structures are prohibited within the buffer zone. An applicant must submit sufficient evidence of its property interest to demonstrate the reclaimed water production facility meets the applicable buffer zone.

§321.319. Public Notice Requirements.

(a) Public notice is not required if an applicant for a reclaimed water production facility qualifies for an enhanced buffer zone designation in accordance with §321.317(d) of this title (relating to Buffer Zone Requirements).

(b) An applicant for a reclaimed water production facility that does not qualify for an enhanced buffer zone designation shall publish notice of the executive director's preliminary determination on the application at least once in a newspaper of general circulation in the county where the reclaimed water production facility is located or proposed to be located. The notice shall be published at the applicant's expense.

(1) The applicant must publish notice no later than 30 days after receiving instructions to publish notice from the Texas Commission on Environmental Quality's (TCEQ's) Office of the Chief Clerk. The notice must include:

(A) the legal name of the applicant and the address of the applicant;

(B) a brief summary of the information included in the application;

(C) the location of the reclaimed water production facility;

(D) the location and mailing address where the public may provide comments to the TCEQ;

(E) the public location or the publicly accessible internet Web site where copies of the application, executive director's technical summary, and authorization may be reviewed;

(F) an opportunity for the public to submit comments on the application and executive director's technical summary; and

(G) instructions to the public on how to request a public meeting for a new reclaimed water production facility.

(2) The applicant must file with the Office of the Chief Clerk no later than 30 days after receiving the instruction to publish the notice of the executive director's preliminary determination on the application, and if applicable the notice of public meeting:

(A) a signed affidavit from the publisher acknowledging that the notice was published and the date of publication; and

(B) a copy of the newspaper clipping.

(3) The public comment period begins on the first date the notice is published and ends 30 days later unless a public meeting is held. If a public meeting is held, the public comment period ends either 30 days after the initial notice is published or at the conclusion of the public meeting, whichever is later.

(4) The public may submit written comments to the Office of the Chief Clerk during the comment period detailing how the application for the reclaimed water production facility fails to meet the technical requirements or conditions of this rule. The executive director will consider all comments received during the comment period.

(5) The public may submit a written request for a public meeting to the Office of the Chief Clerk during the comment period.

(A) The executive director will determine if there is significant interest to hold a public meeting.

(B) If the executive director determines that there is significant interest to hold a public meeting:

(i) TCEQ staff will facilitate the meeting; and

(ii) the applicant will:

(I) arrange accommodations for the public meeting to be held in the county where the reclaimed water production facility will be located; and

(II) publish notice of the public meeting in the same newspaper as the initial notice was published at least 30 days prior to the meeting.

(iii) At the public meeting the applicant will:

(I) describe the proposed reclaimed water production facility and provide maps and other facility data; and

(II) provide a sign-in sheet for attendees to register their names and addresses and furnish the sheet to the executive director.

(C) A public meeting held under this rule is not an evidentiary proceeding.

(6) The TCEQ Office of the Chief Clerk will mail the executive director's decision and final technical summary on which the decision was based to the applicant, persons whose names and addresses appear legibly on the sign-in sheet from the public meeting, and persons who submitted written comments.

§321.321. Additional Reclaimed Water Production Facility Requirements.

(a) The owner shall employ or contract with one or more licensed wastewater treatment facility operators or wastewater facility operations companies holding a valid license or registration according to the requirements of Chapter 30, Subchapter J of this title (relating to Wastewater Operators And Operations Companies).

(b) The operator or wastewater facility operations company shall have the same level of license or higher as the operator license of the permitted domestic wastewater treatment facility associated with the reclaimed water production facility.

(c) The owner shall notify the executive director at least 45 days prior to completion and at least 45 days prior to operation of a reclaimed water production facility.

§321.323. Enforcement.

(a) If an owner of a reclaimed water production facility fails to comply with the terms of its authorization, this subchapter, or other regulations and statutes within the jurisdiction of the commission, the executive director may take enforcement action as provided by the Texas Water Code and in accordance with Chapter 70 of this title (relating to Enforcement).

(b) The executive director may revoke any reclaimed water production facility authorization due to noncompliance with the authorization, this subchapter, the requirements of Chapter 210 of this title (relating to Use of Reclaimed Water), or other regulations and statutes within the jurisdiction of the commission, but only after notice and the opportunity for hearing.

§321.325. Fees.

(a) An applicant shall include an application fee of $300.

(b) An owner of a reclaimed water production facility authorized under this subchapter shall pay an annual water quality fee in the following amount:

(1) $800 for a constructed facility; or

(2) $400 for a facility that has not been constructed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 6, 2008.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 239-0177

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CHAPTER 330. MUNICIPAL SOLID WASTE SUBCHAPTER D. OPERATIONAL STANDARDS FOR MUNICIPAL SOLID WASTE LANDFILL FACILITIES

30 TAC §330.165

The Texas Commission on Environmental Quality (commission or TCEQ) proposes an amendment to §330.165.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission is initiating this rulemaking to revise the allowable contaminant levels for materials to be used as alternative daily cover. The commission intends to use a risk based approach when evaluating the use of contaminated material as an acceptable alternative daily cover at Type I municipal solid waste (MSW) landfills.

SECTION DISCUSSION

The contaminants that cause an industrial solid waste to be classified as Class 1 can also be found in contaminated soil from municipal sources and wastes from oil, gas, and geothermal activities. If approved as an alternative daily cover, these contaminated materials continue to be solid wastes and special wastes since the approved use still constitutes disposal of these materials.

The commission proposes to amend §330.165 to revise the criteria for evaluating whether contaminated material may perform as a suitable alternative daily cover material at MSW landfills. Alternative daily cover must have a demonstrated effectiveness in satisfying the control requirements of daily cover and not pose an unacceptable risk to human health and the environment. The commission has established in existing §330.165(d)(4) that contaminated soils may not contain constituents of concern exceeding the leachable concentrations listed in Table 1 of §335.521(a)(1), polychlorinated biphenyl wastes, or total petroleum hydrocarbons in concentrations greater than 1,500 milligrams per kilogram (mg/kg). Additionally, the commission established in existing §330.165(d)(5) that alternative materials may not exceed constituent limitations imposed on wastes authorized to be landfilled. The commission considers the total petroleum hydrocarbon limit as a conservative screening value considered protective of worker direct contact with total petroleum hydrocarbons in soil. The commission has required characterization of contaminated materials as part of a request for use of an alternative daily cover. These existing limits are intended to ensure that the composition of the wastes used as alternative daily cover is appropriate to the wastes being covered within the landfill unit. The commission seeks comment as to the appropriateness of using 1,500 mg/kg total petroleum hydrocarbons as a conservative screening value for regulating the use of contaminated soil and earthen material as alternative daily cover.

The commission proposes to add the term "contaminated earthen material" to §330.165(d)(4) to clearly establish that the requirements of this paragraph also apply to wastes from oil, gas, and geothermal activities and not just surface soils.

The commission proposes to re-evaluate the acceptable contaminant levels for wastes used as alternative daily cover and proposes that the wastes must have constituent concentrations below protective concentration levels established in accordance with §350.76(g). These concentration levels have been established as part of the Texas Risk Reduction Program and are used by other agency programs. For consistency, the commission proposes to use this existing comprehensive risk evaluation process when considering requests to use these types of waste materials as alternative daily cover.

The commission proposes to amend §330.165(d)(5) to allow wastes to be approved as an alternative daily cover, even though they may otherwise exceed the waste disposal limitations authorized at a MSW landfill. Wastes having total petroleum hydrocarbons in concentrations greater than 1,500 mg/kg are further proposed to not be required to be disposed in dedicated Class 1 industrial solid waste landfill cells when approved for use as an alternative daily cover in Type I MSW landfill cells that have approved Resource Conservation and Recovery Act, Subtitle D liners having leachate management systems.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, fiscal implications are anticipated for the agency or other units of state government. Revenue in Fund 549 - Waste Management Account - dedicated may increase because of increased receipts of disposal fees collected. Local governments that own or operate permitted MSW landfills may experience revenue increases or cost savings as a result of administration or enforcement of the proposed rule if wastes contaminated with total petroleum hydrocarbons are used as an alternative daily cover.

Under current rules, contaminated soil having concentrations greater than 1,500 mg/kg total petroleum hydrocarbons may only be disposed of at an MSW landfill in dedicated landfill cells for Class 1 industrial solid wastes. Under the proposed rule, petroleum hydrocarbon wastes could be used as an alternative daily cover if their contaminant concentrations are below protective concentration levels based upon a health based risk assessment and if the MSW landfill has a permitted liner and leachate management system. Material approved for use as alternative daily cover under this rule will still be considered waste, because of the inherent waste-like characteristics of these materials. State disposal fees will be collected in accordance with Texas Health and Safety Code (THSC), §361.013(a) for use of waste, even when used as alternative daily cover under the amended rule.

Revenue Impact to the Agency

Use of contaminated material as alternative daily cover under the proposed rule would be subject to either an industrial or municipal fee amount depending on the source of the material. The portion of tipping fees to be remitted to the agency from the acceptance of municipal source petroleum hydrocarbon waste with greater than 1,500 mg/kg total petroleum hydrocarbons is $0.40 per cubic yard. The agency's portion of tipping fees collected from the disposal of industrial solid wastes exceeding 1,500 mg/kg total petroleum hydrocarbons is $1.92 per cubic yard. The agency deposits any monies remitted into Account 549 - Waste Management Account.

In estimating the amount of industrial waste expected to be used as alternative daily cover under the proposed rule, the commission has considered that some landfills have used similar material in the past and may resume using the material under the proposed rule. Those landfills were using an estimated 100,000 cubic yards per year of petroleum hydrocarbon material, containing Railroad Commission of Texas waste, as alternative daily cover. Under the proposed rule, those MSW landfill operators would be required to begin paying the agency a disposal fee of $1.92 per cubic yard if they choose to resume using this type of material after the proposed rule becomes effective. Revenue deposited in Account 549 - Waste Management Account, could increase by $192,000 per year under the proposed rule if those landfills resume using the amount of material used in the past.

This proposed rule could also result in additional MSW landfills being authorized to receive Class 1 industrial waste as alternative daily cover throughout Texas. By allowing industrial solid waste generators to use an MSW landfill closer in proximity to the site of waste generation and incur lower transportation costs, industrial solid waste generators may be more likely to generate additional waste by removing rather than leaving contaminated soils in place. For purposes of this fiscal note, staff is estimating that there may be as much as an additional 50,000 cubic yards of Class 1 industrial solid waste contaminated with petroleum hydrocarbons generated statewide that may be taken to MSW land-

fills and utilized as an alternative daily cover. The MSW landfill operator would be required to remit to the agency a disposal fee of $1.92 per cubic yard for this additional industrial waste, and if 50,000 cubic yards statewide is used as an alternative daily cover, then the annual revenue increase in Account 549 - Waste Management Account, could be as much as $96,000 in addition to the $192,000 discussed above.

In addition to fees associated with using industrial solid waste under the proposed rule, the commission also expects to collect fees associated with using MSW as alternative daily cover. Staff estimates that there may be as many as 88 local governments and 35 businesses that could apply for permit modifications. If MSW landfill operators obtain permit modifications to use MSWs exceeding 1,500 mg/kg total petroleum hydrocarbons as an alternative daily cover, the MSW landfill operators would be required to remit to the agency a disposal fee of $0.40 per cubic yard when this waste is disposed in an MSW landfill. This proposed rule could result in additional MSW landfills being authorized to receive more highly contaminated soils from MSW sources throughout Texas. These wastes were previously prohibited from disposal in an MSW landfill cell except for disposal in a cell approved for disposal of Class 1 industrial solid waste. For purposes of this fiscal note, staff is estimating that there may be as much as an additional 50,000 cubic yards of MSW contaminated with petroleum hydrocarbons generated statewide that may be taken to MSW landfills and utilized as an alternative daily cover. The MSW landfill operator would be required to remit to the agency a disposal fee of $0.40 per cubic yard for this additional MSW, and if 50,000 cubic yards statewide is used as an alternative daily cover, then the annual revenue increase in Account 549 - Waste Management Account, could be as much as $20,000 in addition to the $288,000 for industrial solid waste for a total increase of $308,000.

Impact to Local Governments

Staff estimates that there may be as many as 88 local governments that own or operate MSW landfills with permitted liner and leachate management systems. If these local governments choose to accept petroleum hydrocarbon wastes under the proposed rule, they will be required to obtain a temporary authorization followed by a one-time permit modification. The temporary authorization and permit modification may cost up to $50,000 per applicant. The number of local governments that would choose to apply for a permit modification is not known, but local governments could partially offset the cost of the permit modification by collecting a disposal fee in addition to the state disposal fee. Staff estimates that a local government could charge as much as $20 per cubic yard, not counting any fees required to be passed through to the agency, to accept petroleum hydrocarbon wastes under the proposed rule. The revenue increase for each local government would depend on the size of the landfill and the amount of petroleum hydrocarbon waste accepted. In addition, by using the petroleum hydrocarbon waste as an alternative daily cover, a local government could save as much as $4.00 per cubic yard it would normally spend for clean soil. The total amount of cost savings would depend on the quantity of these wastes used by each MSW landfill as an alternative daily cover.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be to allow the use of waste material as alternative daily cover at MSW landfills.

Staff does not have the information to determine how many businesses generating petroleum hydrocarbon wastes exceeding 1,500 mg/kg total petroleum hydrocarbons will choose to place such waste in MSW landfills under the proposed rule.

Staff estimates that there may be as many as 35 business-owned MSW landfills with permitted liner and leachate management systems that may choose to use petroleum hydrocarbon wastes as alternative daily cover under the proposed rule. These businesses may incur temporary authorization costs and one-time permit modification costs of up to $50,000, save $4.00 per cubic yard by using petroleum hydrocarbon wastes instead of clean soil as daily cover, and could net $20 per cubic yard in revenue from disposal fees. The net increase in revenue or cost savings generated for each business owned MSW landfill would depend on whether wastes are used as alternative daily cover and the quantity of petroleum hydrocarbon waste used as alternative daily cover.

After temporary authorization costs and permit modification costs of up to $50,000 per applicant are recouped, total statewide revenue gains and cost savings for an annual statewide volume of 200,000 cubic yards could be as much as $4,800,000 per year for these local government and business-owned landfills. The increase in revenue for each owner or operator of an MSW landfill will depend on the characteristics of each landfill and the quantity of these wastes used as alternative daily cover.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Owners or operators of MSW landfills are not typically classified as small or micro-businesses. If a small or micro-business owns or operates an MSW landfill that decides to accept and use petroleum hydrocarbon wastes as an alternative daily cover, it could expect to experience the same revenue and cost increases as those experienced by local governments or large businesses that decide to use petroleum hydrocarbon wastes as alternative daily cover at MSW landfills.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rule is not subject to §2001.0225 because they are not a "major environmental rule" and it does not meet any of the four criteria listed in the statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks

to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This proposal meets the first criteria to be considered a "major environmental rule" because it is intended to protect the environment and reduce risk to human health from environmental exposure. The proposal is intended to allow contaminated soils and wastes generated from activities regulated by the Railroad Commission of Texas (RRC) to be used as an alternative daily cover in an MSW landfill if contaminant concentrations are below protective concentration levels. The provisions that are proposed would allow the use of contaminated soil or contaminated earthen material having concentrations greater than 1,500 mg/kg total petroleum hydrocarbons for use as an alternative daily cover in an MSW landfill and allow wastes approved as an alternative daily cover to exceed waste constituent limitations that may otherwise be authorized for disposal at an MSW landfill. These provisions would only apply to those Type I MSW landfill facilities that have approved Resource Conservation and Recovery Act, Subtitle D liners having leachate management systems.

The proposed rule does not meet the definition of a "major environmental rule" because it is not expected to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Furthermore, a regulatory impact analysis is not required, because the proposed rulemaking does not meet any of the four applicable requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) only applies to a "major environmental rule" adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the proposed rule does not meet any of these applicability requirements. First, there are no standards set for use of this type of material at these facilities by federal law and the proposal is not required by state law. Second, the proposed rule does not exceed an express requirement of state law. There are no specific statutory requirements for alternative daily cover used at MSW landfill facilities. Third, the rule does not exceed an express requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Fourth, the commission does not propose the rule solely under the general powers of the agency, but rather under the authority of: THSC, §361.011, which establishes the commission's jurisdiction over all aspects of the management of MSW; THSC, §361.024, which provides the commission with rulemaking authority; THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste. Therefore, the commission does not propose the adoption of the rule solely under the commission's general powers.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific intent of the proposed rulemaking is to ensure that contaminated soils and wastes generated from activities regulated by the RRC that are used as an alternative daily cover in an MSW landfill have contaminant concentrations that are below protective concentration levels. The provisions that are proposed would allow wastes approved as an alternative daily cover to exceed waste constituent limitations authorized for disposal at an MSW landfill. These provisions would apply to those Type I MSW landfill cells that have approved Resource Conservation and Recovery Act, Subtitle D liners having leachate management systems.

The proposed rulemaking provides a benefit to society by protecting the environment, public health, and safety. The provisions relate to allowing use of wastes as alternative daily cover and do not impose a burden on a recognized real property interest and therefore do not constitute a taking.

The promulgation of the proposed rulemaking is neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rulemaking does not affect a landowner's rights in a recognized private real property interest because this rulemaking neither: burdens (constitutionally) or restricts or limits the owner's right to the property that would otherwise exist in the absence of this rulemaking; nor would it reduce its value by 25% or more beyond that value which would exist in the absence of the proposed rules. Therefore, the proposed rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rule include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); to ensure sound management of all costal resources by allowing for compatible economic development and multiple human uses of the coastal zone; and to balance benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone.

CMP policies applicable to the proposed rule include the construction and operation of solid waste treatment, storage, and disposal facilities and discharge of municipal and industrial waste to coastal waters.

Promulgation and enforcement of the rule will not violate or exceed any standards identified in the applicable CMP goals and policies, because the rule does not create or have a direct or significant adverse effect on any coastal natural resource areas, and because, like the current rules, the proposed rule would ensure proper MSW management in all regions of the state, including coastal areas.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on July 15, 2008 at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Michael Parrish, Office of Legal Services at (512) 239-2548. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-013-330-PR. The comment period closes July 21, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Wayne Harry, Municipal Solid Waste Permits Section, at (512) 239-6619.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties; and THSC, §361.002, Policy and Findings; THSC, §361.011, which establishes the commission's jurisdiction over all aspects of the management of MSW; THSC, §361.024, which provides the commission with rulemaking authority; and THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste. The proposed amendment implements THSC, §361.024, which provides the commission with rulemaking authority; and THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The proposed amendment implements Texas Water Code, §5.103 and THSC, §§361.002, 361.011, 361.024, and 361.061.

§330.165. Landfill Cover.

(a) - (c) (No change.)

(d) Alternative daily cover. Alternative daily cover may only be allowed by a temporary authorization under §305.70(m) of this title (relating to Municipal Solid Waste Permit and Registration Modifications) followed by a major amendment or a modification in accordance with §305.70(k)(1) of this title. Use of alternative daily cover is limited to a 24-hour period after which either waste or daily cover as defined in subsection (a) of this section must be placed.

(1) - (3) (No change.)

(4) For contaminated soil or contaminated earthen material proposed to be used as alternative daily cover in a municipal solid waste landfill, the constituents of concern shall not exceed the concentrations listed in Table 1, Constituents of Concern and Their Maximum Leachable Concentrations, located in §335.521(a)(1) of this title (relating to Appendices). Additionally, the contaminated soil or contaminated earthen material must not contain:

(A) (No change.)

(B) total petroleum hydrocarbons in concentrations greater than 1,500 milligrams per kilogram. The owner or operator may submit a demonstration for executive director approval that material exceeding 1,500 milligrams per kilogram (mg/kg) total petroleum hydrocarbons can be a suitable alternative daily cover if the material has constituent concentrations below protective concentration levels. The demonstration shall include information regarding the risk to human health and the environment, establishing protective concentration levels in accordance with §350.76(g) of this title (relating to Approaches for Specific Chemicals of Concern to Determine Human Health Protective Concentration Levels), and the information required in paragraph (1) of this subsection. These materials may only be approved for use at Type I landfill units that have liners approved under §330.331(a)(1) or (2) of this title (relating to Design Criteria) and leachate provisions approved under §330.333 or §330.335 of this title (relating to Leachate Collection System and Alternative Liner Design). If approved, the executive director may impose additional permit requirements regarding the use of this material.

(5) Alternative daily cover must not exceed constituent limitations imposed on waste authorized to be disposed at the facility. Except as stated in §330.15 of this title (relating to General Prohibitions), this restriction does not apply to material approved for use as alternative daily cover under paragraph (4)(B) of this subsection. Waste that is approved for use as alternative daily cover under paragraph (4)(B) of this subsection is not subject to the requirements of §330.171(b)(4) of this title (relating to Disposal of Special Wastes) and §330.331(e) of this title.

(6) (No change.)

(e) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 6, 2008.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 239-2548

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 13. LAND RESOURCES

SUBCHAPTER B. RIGHTS-OF-WAY OVER PUBLIC LANDS

31 TAC §13.17

The commissioner of the General Land Office (GLO) proposes amendments to 31 TAC, Part 1, Chapter 13, relating to Land Resources, Subchapter B, relating to Rights-of-Way Over Public Lands, §13.17, relating to Fees for Right-of-Way Easements.

The intent of this rulemaking is to amend the applicable fees for pipeline right-of-way easements across public lands and to change the number of and boundaries of the regions that define the geographic limits to which the fees apply. References to renewal terms are deleted in one case and modified in another in order to allow the commissioner the flexibility to deal with the merits of each easement, as provided for by statutory changes made during the 80th Legislature by Senate Bill 654.

BACKGROUND AND SECTION-BY-SECTION ANALYSIS OF PROPOSED AMENDMENTS

Section 13.17(a) substitutes the Attached Graphic with a new graphic that provides revised rate schedules for 10 and 20-year pipeline easement terms and also provides a revised Pipeline Easements Regions Map. The rate schedule includes notes that ascribe processing fees, minimum easement rates, an annual rate adjustment index, and clarifications about the applicability of the rates. The current pipeline easement rates were established in February 1984 and they were applied to standard 10-year easement terms. The Regions map was also established in 1984.

Section 13.17(c) strikes a phrase requiring a renewal term of 10 years for easements initially issued after December 31, 1983. Striking this enables the commissioner to work with the grantee on renewal terms under the discretion provided by §§51.291 et seq. Texas Natural Resource Code (TNRC).

Section 13.17(d) changes from 10 years to 20 years in a phrase that allows the commissioner to renew easements for any length of time less than the 20 years, and retains the language that specifies that the rate for renewal for a specific period of time will be prorated accordingly.

FISCAL AND EMPLOYMENT IMPACTS

Mr. Rene Truan, Deputy Commissioner for the GLO's Professional Services Program Area, has determined that for each year of the first five years the amended sections as proposed are in effect there will be no additional cost to state government as a result of enforcing or administering the amended sections. Administration of the proposed amendments to §13.17(a) will cause an increase in revenue to the Permanent School Fund, and an increase in state revenue as both rent and fee rates are increased by the changes.

Mr. Truan has determined that for each year of the first five years the amended sections as proposed are in effect there will be no fiscal implications for local governments as a result of enforcing or administering the amended sections.

Mr. Truan has also determined that for each year of the first five years the amended sections as proposed are in effect there will be increased economic costs to businesses that secure new pipeline easements or renew expiring contracts. It has been determined by the GLO that since the rates for pipeline easements has not changed since 1984 an increase is necessary in order for the Permanent School Fund to receive fair compensation for the use of its land. The method used to establish the proposed increase in rates involved calculating the historical increase in the Consumer Price Index between February 1984 and December 2007, and applying this increase to the current rate. This resulted in an average increase of about 200 per cent. The current minimum rate for a pipeline easement is proposed to increase by 34 per cent. The current fee for contract events such as amendments, assignments, and renewals is proposed to increase 600 per cent to capture the administrative costs associated with such events. A new, one-time damages fee is proposed for all new easements. The historical term for a pipeline easement has been 10 years and the proposed change allows terms up to 20 years, resulting in a doubling of the 10-year rate.

The proposed rate increases would result in the Permanent School Fund (PSF) no longer charging the lowest rate as compared to what other large-acreage land owners charge and would keep the new rates below the highest levels that comparable owners charge.

The proposed change to the boundary map essentially combines two regions west of the coastal counties and results in three regions instead of the current four regions. There is no current reason tied to operations that support maintaining four regions.

The board has determined that the proposed rulemaking will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code §2001.022.

PUBLIC BENEFIT

Mr. Truan has determined that the public will benefit from the proposed amendments because the administration of pipeline easements on public land will predominantly move to a twenty year cycle rather than the current ten year cycle, thus saving processing time for easement renewals. In addition, additional revenue deposited to the Permanent School Fund ultimately benefits K-12 school children of Texas.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed rulemaking in accordance with Texas Government Code, §2007.043(b), and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines, to determine whether a detailed takings impact assessment is required. The GLO has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined that the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments. The GLO has determined that the proposed rulemaking will not result in a taking of private property and that there are no adverse impacts on private real property interests inasmuch as the property subject to the proposed amendments is owned by the state.

CONSISTENCY WITH CMP

The proposed rulemaking is subject to the CMP, 31 TAC §505.11(a)(1)(C)-(I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. The GLO has reviewed these proposed actions for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals); §501.17 (Relating to Policy for Construction, Operation, and Maintenance of Oil and Gas Exploration and Production Facilities); and §501.23 (relating to Policies for Development in Critical Areas); and §501.24 (relating to Policies for Construction of Waterfront Facilities and Other Structures on Submerged Lands). The proposed rulemaking changes only the amount of compensation paid for easements, not the manner in which operations are conducted. Therefore, since requests for the use of coastal public land must continue to meet the same criteria for GLO approval, the GLO has determined that the proposed actions are consistent with applicable CMP goals and policies. The proposed amendments will be distributed to Council members in order to provide them an opportunity to provide comment on the consistency of the proposed new rules during the comment period.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendments are proposed under the Texas Natural Resources Code §§51.291 - 51.307, relating to the commissioner's ability to grant easements or other interests in property for rights-of-way or access across, through and under state public land; and Texas Natural Resources Code §51.014(a) and §51.014(b), providing that the commissioner may adopt procedural and substantive rules which it considers necessary to administer, implement and enforce Chapter 51, Texas Natural Resources Code, with the approval of the governor.

Texas Natural Resources Code §§51.291 - 51.307 are affected by the proposed amendments.

§13.17. Fees for Right-of-Way Easements.

(a) The following table lists the fees and terms for pipeline right-of-way easements across public lands as established by the commissioner of the General Land Office.
Figure: 31 TAC §13.17(a)

(b) (No change.)

(c) Right-of-way easements issued for new pipelines after December 31, 1983, shall be renewed [~~for an additional 10-year term~~] at the full rate applicable to pipelines at the time of renewal, provided grantee has complied with all the terms and conditions of the easement agreement, including the notice, application, renewal fee payment, and documentation requirements contained therein.

(d) At the commissioner's discretion, a right-of-way easement for pipelines may be renewed for a term less than 20 [~~10~~] years and the rates prorated accordingly.

(e) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802992
Larry L. Laine
Chief Clerk/Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 475-1859

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TITLE 34. PUBLIC FINANCE

PART 12. STATE EMPLOYEE CHARITABLE CAMPAIGN

CHAPTER 326. CAMPAIGN MANAGEMENT

34 TAC §326.1, §326.5

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) proposes amendments to §326.1, concerning 10% cap; and proposes new §326.5, concerning campaign budget.

The proposed amendment to §326.1 clarifies statutory provisions that subject a fee charged by a campaign manager to a 10% cap. This rule is intended to comply with the SPC's understanding of Texas Attorney General Opinion, GA-0565 (2007). Fees charged by campaign managers to participating charitable organizations must only cover actual costs. When all fees of all local campaign managers and the state campaign manager are added up, the total amount may not exceed 10% of the total amount of contributions collected in the state employee charitable campaign that same year. If the total exceeds the 10% cap, the SPC may approve, but it is not required to approve, the excess amount. The SPC may approve the excess amount only if the SPC determines that the excess amount is supported by actual, reasonable and documented costs.

The proposed new §326.5 addresses the procedures to be followed with regard to campaign budgets when the projected combined expenses of the state campaign manager and each local campaign manager for the campaign year result in a combined fee that exceeds 10% of the total amount projected to be collected in the entire state employee charitable campaign that same campaign year.

Mike Markl, Certifying Officer for the SPC, has determined that, for the first five-year period that the proposed amendment and new rule are in effect, there are no foreseeable fiscal implications for state or local governments as a result of enforcing or administering the amended and new sections.

Mr. Markl also has determined that, for each year of the first five years the proposed amendment and new rule are in effect, the public benefit anticipated as a result of enforcing the amended and new sections will be continued consistency in treatment of and accountability for campaign expenses among campaign areas statewide. There will be no effect on small or micro businesses. There are no anticipated economic costs to persons who are required to comply with the amended or new section as proposed.

Comments on the proposals may be submitted to Roxanne Jones, SECC State Campaign Manager, United Way of Texas, 1122 Colorado, Suite 101, Austin, Texas 78701.

The amendment and new rule are proposed under the authority of Texas Government Code, §659.139, which provides that the state employee charitable campaign must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The proposed amendment and new rule also implement Government Code, §659.148(b) - (c), relating to the fees that a campaign manager may charge to participating charitable organizations.

§326.1. 10% Cap.

The only fee a campaign manager may charge is for actual campaign expenses that are reasonable and necessary. The fee must be based on the combined expenses of the state campaign manager and each local campaign manager, and the total of all fees [~~combined~~ ~~fee~~] may not exceed 10% of the total amount of contributions collected in the state employee charitable campaign unless the State Policy Committee approves a higher amount to accommodate reasonable documented costs.

§326.5. Campaign Budget.

(a) The state campaign manager will review budgets from all local campaign areas and determine the projected combined expenses of the state campaign manager and each local campaign manager, including all fees. If the state campaign manager calculates this total will exceed 10% of the total amount collected in the state employee charitable campaign, the state campaign manager will notify the State Policy Committee.

(b) If it is determined that the projected combined expenses of the state campaign manager and each local campaign manager, and the total of all fees exceeds 10% of the total amount collected in the state employee charitable campaign, the approved budget of each Local Employee Committee is subject to review by the State Policy Committee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 4, 2008.

TRD-200802884
Mike Esparza
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 475-0387

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CHAPTER 327. LOCAL CAMPAIGN MANAGEMENT

34 TAC §§327.1, 327.5, 327.7

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) proposes amendments to §327.1, concerning a 10% cap; proposes new §327.5, concerning local campaign budget, and proposes new §327.7, concerning local budget form.

The proposed amendment to §327.1 clarifies statutory provisions that subject a fee charged by a campaign manager to a 10% cap. This rule is intended to comply with the SPC's understanding of Texas Attorney General Opinion GA-0565 (2007). Fees charged by campaign managers to participating charitable organizations must only cover actual costs. When all fees of all local campaign managers and the state campaign manager are added up, the total amount may not exceed 10% of the total amount of contributions collected in the state employee charitable campaign that same year. If the total exceeds the 10% cap, the SPC may approve, but it is not required to approve, the excess amount. The SPC may approve the excess amount only if the SPC determines that the excess amount is supported by actual, reasonable and documented costs.

The proposed new §327.5 requires each local campaign manager to submit the approved budget for the applicable local campaign area. This rule requires that the approved budget be submitted using a required format, and it authorizes the State Campaign Manager to set the deadline for submission of local budgets to the SCM. The rule is intended to facilitate compliance with the statutorily-prescribed cap on the total amount of combined fees that may be charged statewide to participating charitable organizations. The rule also increases the likelihood that a meaningful comparison may be made among the budgets of local campaign areas as a result of standardized reporting.

A new §327.7 adopts by reference a form to be used by local campaign managers to submit the local campaign budget. The form incorporates the factors that must be considered by the SPC in approving a total combined fee that exceeds the statutory 10% cap on the combined total fees to be charged to charitable organizations by all LCMs and the SCM, as a whole. Copies of the proposed form may be obtained from the State Campaign Manager at United Way of Texas, 1122 Colorado, Suite 101, Austin, Texas 78701.

Mike Markl, Certifying Officer for the SPC, has determined that, for the first five-year period the proposed amendments and new rules are in effect, there are no foreseeable fiscal implications for state or local governments as a result of enforcing or administering the amended and new sections.

Mr. Markl also has determined that, for each year of the first five years the proposed amendments and new rules are in effect, the public benefit anticipated as a result of enforcing the amended and new sections will be continued consistency in treatment of and accountability for campaign expenses among campaign areas statewide. There will be no effect on small or micro businesses. There are no anticipated economic costs to persons who are required to comply with the amended and new sections as proposed.

Comments on the proposals may be submitted to Roxanne Jones, SECC State Campaign Manager, United Way of Texas, 1122 Colorado, Suite 101, Austin, Texas 78701.

The amendments and new rules are proposed under the authority of Texas Government Code, §659.139, which provides that the state employee charitable campaign must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely

charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The proposed amendments and new rules also implement Texas Government Code, §659.148(b) - (c), relating to the fees that a campaign manager may charge to participating charitable organizations.

§327.1. 10% Cap.

The only fee a campaign manager may charge is for actual campaign expenses that are reasonable and necessary. The fee must be based on the combined expenses of the state campaign manager and each local campaign manager, and the total of all fees [~~combined fee~~] may not exceed 10% of the total amount of contributions collected in the state employee charitable campaign unless the State Policy Committee approves a higher amount to accommodate reasonable documented costs.

§327.5. Local Campaign Budget.

Each local campaign manager is required to submit a budget approved by the Local Employee Committee to the state campaign manager by the deadline set forth by the state campaign manager, and by using the required budget template.

§327.7. Local Budget Form.

The SPC adopts by reference the form entitled, Local Campaign Manager Budget, rev.1/September 1, 2008, for the submission of local campaign budgets. Copies of the form may be obtained by writing to SECC State Campaign Manager, United Way of Texas, 1122 Colorado, Suite 101, Austin, Texas 78701.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200802891
Mike Esparza
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 475-0387

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CHAPTER 329. ELIGIBILITY CRITERIA FOR STATEWIDE FEDERATIONS/FUNDS AND AFFILIATED ORGANIZATIONS

34 TAC §329.1

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) proposes amendments to §329.1, concerning audit and review requirements.

The proposed amendments provide that if a reconciliation letter is submitted with the application for participation in the campaign, it shall be signed by the executive director of the applicant organization. The rule also states that the SPC may require additional information if the reconciliation letter is not sufficient. Some of the additional information required may include a reconciliation letter signed by the auditor or accountant who completed the audit or accountant's review or who completed the Form 990 contained in the organization's application. This provision is added to ensure that the reconciliation of discrepancies between the audit or accountant's review and the Form 990 are accurate.

Mike Markl, Certifying Officer for the SPC, has determined that, for the first five-year period the proposed amendments are in effect, there are no foreseeable fiscal implications for state or local governments as a result of enforcing or administering the amended section.

Mr. Markl also has determined that, for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amended section will be continued consistency in treatment of and accountability for campaign expenses among campaign areas statewide. There will be no effect on small or micro businesses. There are no anticipated economic costs to persons who are required to comply with the amended section as proposed.

Comments on the proposal may be submitted to Roxanne Jones, SECC State Campaign Manager, United Way of Texas, 1122 Colorado, Suite 101, Austin, Texas 78701.

The amendments are proposed under the authority of Texas Government Code, §659.139, which provides that the state employee charitable campaign must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The proposed amendments also implement Texas Government Code, §659.140(e)(3), wherein the SPC is directed to determine the eligibility of a federation or fund and its affiliated agencies to participate in the SECC. Basic eligibility requirements are addressed by statute in §659.146, concerning eligibility of charitable organizations in general and eligibility of federations and funds for statewide participation. These amendments incorporate those basic requirements and provide a process to facilitate review of an organization based on those provisions.

§329.1. Audit and Review Requirements.

(a) To be eligible to participate in the state employee charitable campaign, if the charitable organization's budget:

(1) is not more than $100,000, the organization shall provide a completed Internal Revenue Service (IRS) Form 990 and an accountant's review that offers full and open disclosure of the organization's internal operations; or

(2) is greater than $100,000, the organization shall be audited annually in accordance with generally accepted auditing standards of the American Institute of Certified Public Accountants. A copy of the report of such audit shall be provided with the application along with a completed Internal Revenue Service (IRS) Form 990.

(b) When a charitable organization submits an audit or accountant's review, a copy of the organization's most recent annual audit or accountant's review must be included with the application. The audit or accountant's review must cover the fiscal year ending not more than 18 months prior to the January of the campaign year in which the organization is applying for participation. The IRS Form 990 and audit or accountant's review must cover the same fiscal period. [~~If the revenue and expenses on these two documents differ, the reconciliation must be included in the IRS Form 990 itself or be included in a letter of reconciliation submitted by the certified public accountant who completed the audit or accountant's review.~~]

(c) If the revenue or expenses on the audit or accountant's review differ from those appearing in IRS Form 990, a reconciliation must be included in IRS Form 990 itself or be explained in a letter of reconciliation signed by the Executive Director and enclosed with the application.

(d) Should the accompanying reconciliation letter not clarify the differences to the satisfaction of the committee, the committee may require additional explanation from the applicant organization. The committee may also require additional explanation to be submitted in the form of a reconciliation letter signed by:

(1) the auditor or firm that conducted the audit;

(2) the accountant or firm that conducted the accountant's review; or

(3) the accountant or firm who prepared IRS Form 990.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 4, 2008.

TRD-200802885
Mike Esparza
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
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For further information, please call: (512) 475-0387

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CHAPTER 330. ELIGIBILITY CRITERIA FOR LOCAL FEDERATIONS/FUNDS, AFFILIATED ORGANIZATIONS, AND LOCAL CHARITABLE ORGANIZATIONS

34 TAC §330.1

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) proposes amendments to §330.1, concerning audit and review requirements.

The proposed amendments provide that, if a reconciliation letter is submitted with the application for participation in the campaign, it shall be signed by the executive director of the applicant organization. The rule also states that the SPC may require additional information if the reconciliation letter is not sufficient. Some of the additional information required may include a reconciliation letter signed by the auditor or accountant who completed the audit or accountant's review or who completed the Form 990 contained in the organization's application. This provision is added to ensure that the reconciliation of discrepancies between the audit or accountant's review and the Form 990 are accurate.

Mike Markl, Certifying Officer for the SPC, has determined that, for the first five-year period the proposed amendments are in effect, there are no foreseeable fiscal implications for state or local governments as a result of enforcing or administering the amended section.

Mr. Markl also has determined that, for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amended section will be continued consistency in treatment of and accountability for campaign expenses among campaign areas statewide. There will be no effect on small or micro businesses. There are no anticipated economic costs to persons who are required to comply with the amended section as proposed.

Comments on the proposal may be submitted to Roxanne Jones, SECC State Campaign Manager, United Way of Texas, 1122 Colorado, Suite 101, Austin, Texas 78701.

The amendments are proposed under the authority of Texas Government Code, §659.139, which provides that the state employee charitable campaign must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The proposed amendments also implement Texas Government Code, §659.140(e)(3), wherein the SPC is directed to determine the eligibility of a federation or fund and its affiliated agencies to participate in the SECC. Basic eligibility requirements are addressed by statute in §659.146, concerning eligibility of charitable organizations in general. These amendments incorporate those basic requirements and provide a process to facilitate review of an organization based on those provisions.

§330.1. Audit and Review Requirements.

(a) To be eligible to participate in the state employee charitable campaign, if the charitable organization's budget:

(1) is not more than $100,000, the organization shall provide a completed Internal Revenue Service (IRS) Form 990 and an accountant's review that offers full and open disclosure of the organization's internal operations; or

(2) is greater than $100,000, the organization shall be audited annually in accordance with generally accepted auditing standards of the American Institute of Certified Public Accountants. A copy of the report of such audit shall be provided with the application along with a completed Internal Revenue Service (IRS) Form 990.

(b) When a charitable organization submits an audit or accountant's review, a copy of the organization's most recent annual audit or accountant's review must be included with the application. The audit or accountant's review must cover the fiscal year ending not more than 18 months prior to the January of the campaign year in which the organization is applying for participation. The IRS Form 990 and audit or accountant's review must cover the same fiscal period. [~~If the revenue and expenses on these two documents differ, the reconciliation must be included in the IRS Form 990 itself or be included in a letter of reconciliation submitted by the certified public accountant who completed the audit or accountant's review.~~]

(c) If the revenue or expenses on the audit or accountant's review differ from those appearing in IRS Form 990, a reconciliation must be included in IRS Form 990 itself or be explained in a letter of reconciliation signed by the Executive Director and enclosed with the application.

(d) Should the accompanying reconciliation letter not clarify the differences to the satisfaction of the committee, the committee may require additional explanation from the applicant organization. The committee may also require additional explanation to be submitted in the form of a reconciliation letter signed by:

(1) the auditor or firm that conducted the audit;

(2) the accountant or firm that conducted the accountant's review; or

(3) the accountant or firm who prepared IRS Form 990.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mike Esparza
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
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For further information, please call: (512) 475-0387

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 101. ADMINISTRATIVE RULES AND PROCEDURES

(Editor's note: The Texas Register has excluded from this issue proposed rulemaking documents for Title 40, Chapter 101, Subchapter E, relating to Appeals and Hearing Procedures, because the numbering scheme conflicted with existing sections of the 40 TAC Chapter 101; therefore, references to those rules in the Department of Assistive and Rehabilitative Services' other rulemaking documents may not be accurate.)

The Texas Health and Human Services Commission ("HHSC"), on behalf of the Texas Department of Assistive and Rehabilitative Services ("DARS"), proposes amendments and repeal to the rules of the Texas Department of Assistive and Rehabilitative Services, Title 40, Part 2, Chapter 101, Administrative Rules and Procedures, Subchapters A, B, C, D, F and I.

Specifically, DARS is proposing amendments to Subchapter A, General Rules, §101.101, Definitions; Subchapter B, Purchase of Goods and Services, §101.201, Purchase for Individual Consumers, and §101.203, Standards for Facilities and Providers of Services; Subchapter C, Historically Underutilized Businesses, §101.551, Purpose, §101.553, Applicability, §101.555, Definitions, and §101.557, Adoption of Rules; Subchapter D, Councils and Committees, §101.601, Rehabilitation Council of Texas, §101.603, State Independent Living Council, and §101.605, Early Childhood Intervention Advisory Committee; and renaming the title of Subchapter F, from "Durable Medical Equipment and Assistive Technology Listing", to "General Rules", and removing the Division 2 designation, along with its title; however, the rules in Subchapter F remain unchanged. Additionally, DARS is proposing the repeal of Subchapter I, Administrative Rules and Procedures Pertaining to Early Childhood Intervention Services, Division 2, Agency Administration, §101.5641, Employee Training and Education.

The amendments and repeal are being proposed pursuant to DARS' four-year rules review of Chapter 101, as required by Texas Government Code §2001.039. In accordance with Texas Government Code §2001.039, DARS conducted its four-year review of Chapter 101. As a result of the review, DARS determined that the reasons for initially adopting these rules continue to exist. However, the review identified areas where amendments and repeal were needed to update and/or clarify legal references and citations, remove obsolete language, and provide further clarification of rules provisions. Notice of the proposed rule review of Chapter 101 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863). Note that Subchapter E, Appeals and Hearing Procedures for Vocational Rehabilitation and Independent Living Programs, of Chapter 101, was also included in the notice of intent to review Chapter 101. However, the results of the review of Subchapter E, which are to repeal and replace Subchapter E, are being proposed contemporaneously elsewhere in this issue of the *Texas Register*.

The following statutes and regulations authorize the proposed amendments and repeal: The Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 et seq.; the regulations of the Department of Education, Rehabilitation Services Administration, 34 C.F.R. Part 361, 363, 364, 365, 366, and 367, as amended; Texas Human Resources Code, Chapters 73, 81, 82, 91, 111, 116, and 117; Texas Health and Safety Code, Chapter 432; The Individuals with Disabilities Education Act, as amended, 20 U.S.C. §1400 et seq. and implementing regulations; 29 U.S.C. §§725 and 796d; 42 U.S.C. §§300x-3(a), 300x-4(e), and 15025; 34 C.F.R. Part 303, Subpart G; and Texas Government Code, Chapters 411, 551, 552, 559, 2001, 2155, and 2161.

Bill Wheeler, Chief Financial Officer, Texas Department of Assistive and Rehabilitative Services, estimates that for each year of the first five years that the proposed rules are in effect, there will be no foreseeable fiscal implications for state or local governments as a result of enforcing or administering the rules.

Mr. Wheeler has determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be assurances to the public that the necessary rules are in place to provide clarity to the general administrative rules and procedures of DARS. He has also determined that there will be no probable economic cost to persons who are required to comply with the proposed rules. Furthermore, in accordance with Texas Government Code §2001.022, Mr. Wheeler has determined that the proposed rules will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Mr. Wheeler has determined that the proposed rules will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed rules may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756.

SUBCHAPTER A. GENERAL RULES

40 TAC §101.101

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§101.101. Definitions.

The following words and terms, when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise:

(1) Department/DARS--The Department of Assistive and Rehabilitative Services.

(2) Counselor--An employee of the Department who is trained to provide vocational guidance and counseling and meets the minimum qualifications designated in a functional job description.

[~~(3) Extended employment--An occupation-oriented facility operated by a not-for-profit agency, public or private, which, except for its staff, employs only individuals with mental or physical disabilities.~~]

(3) [~~(4)~~] State plan--The plan for vocational rehabilitation services submitted by the Department of Assistive and Rehabilitative Services, Division for Rehabilitation Services and Division for Blind Services in compliance with the Rehabilitation Act of 1973, as amended, Title I.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802924
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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SUBCHAPTER B. PURCHASE OF GOODS AND SERVICES

40 TAC §101.201, §101.203

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§101.201. Purchases for Individual Consumers of Vocational Rehabilitation Services.

Purchases of goods and/or services for individual consumers must be consistent with the Individualized Plan for Employment (IPE) which is jointly developed by the DRS or DBS Counselor and eligible consumer.

(1) - (6) (No change.)

§101.203. Standards for Facilities and Providers of Services.

(a) Facilities and providers of services used by the Department in providing vocational rehabilitation services are required to satisfy the following minimum standards.

(1) - (7) (No change.)

(b) The Department does not [~~operate,~~] license, certify, or register facilities or providers of services including those used by the Department in providing vocational rehabilitation services, except for blind vendors licensed under Human Resources Code Chapter 94, providers who are interpreters for the individuals who are deaf or hard of hearing, certified by the Department's Board for Evaluation of Interpreters under Chapter 109 of this title (relating to Office for Deaf and Hard of Hearing Services) and providers who are registered Early Intervention Specialists (EIS), under Chapter 108 of this title (relating to Division for Early Childhood Intervention Services), [~~under the Human Resource Code, §48.036,~~] but does assure that services provided comply with standards set by the Department.

(c) - (d) (No change).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 424-4050

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SUBCHAPTER C. HISTORICALLY UNDERUTILIZED BUSINESSES

40 TAC §§101.551, 101.553, 101.555, 101.557

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§101.551. Purpose.

The purpose of this subchapter is to establish the authority and responsibility to promote full and equal business opportunities for all businesses in state contracting in accordance with results of the [~~goals specified in the~~] State of Texas Disparity Study. It is the policy of the State of Texas and the Department of Assistive and Rehabilitative Services to encourage the use of historically underutilized businesses (HUBs) and to implement this policy through race, ethnic, and gender-neutral means.

§101.553. Applicability.

This subchapter applies to all contracts and purchase orders established under the requirements of Government Code Chapter 2155. It also applies to all bids, proposals, offers, or other applicable expressions of interest over $100,000 as defined in Texas Administrative Code, Title 34 [~~1~~], Part 1 [~~5~~], Chapter 20 [~~111~~], Subchapter B, Historically Underutilized Business Program, §20.14, Subcontracts [~~§111.14~~] and Government Code Chapter 2161, Subchapter F (relating to Historically Underutilized Businesses) [~~HUB subcontracting responsibilities~~].

§101.555. Definitions.

In this subchapter, the following definitions apply.

(1) Economically Disadvantaged Person--A person who is economically disadvantaged because of the person's identification as a

member of a certain group, as defined in 34 [~~1~~] TAC §20.12 [~~§111.12~~] (relating to Definitions), and who has suffered the effects of discriminatory practices or other similar insidious circumstances over which the person has no control.

(2) Good Faith Effort (GFE)--Evidence of certain criteria used by prime contractors to promote inclusion of HUBs in contracts with an expected value of $100,000 or more as defined in 34 [~~1~~] TAC §20.13 [~~§111.13~~] (relating to Annual Procurement Utilization Goals) and §20.14 [~~§111.14~~] (relating to [~~Annual Procurement Utilization Goals and~~] Subcontracts). When applied to agency GFE, the state auditor shall consider whether the agency has adopted rules under §2161.003, Government Code; has used the Texas Comptroller of Public Accounts, Texas Procurement and Support Services [~~Building and Procurement Commission (TBPC)~~] directory and other resources to identify HUBs that are able to contract with the agency; made good faith, timely efforts to contact identified HUBs regarding contracting opportunities; [~~and~~] conducted its procurement program in accordance with the good faith methodology set out in the Comptroller's [~~TBPC~~] rules and established goals for contracting with HUBs in each procurement category based on scheduled fiscal year expenditures and the availability of HUBs in each category as determined by rules adopted under §2161.002, Government Code.

(3) Historically Underutilized Business (HUB)--A business entity that is a corporation, sole proprietorship, partnership, joint venture, etc. owned and operated by an economically disadvantaged person or persons as defined in 34 [~~1~~] TAC §20.12 [~~§111.12~~] (relating to Definitions) with its principal place of business in Texas.

(4) HUB Subcontracting Plan (HSP)--a plan required to be submitted with bids, proposals, offers, or other applicable expressions of interest that determine or describe HUB subcontracting opportunities probable under the contract as defined in 34 [~~1~~] TAC §20.13 (relating to Annual Procurement Utilization Goals) [~~§111.13~~] and §20.14 [~~§111.14~~] (relating to [~~Annual Procurement Utilization Goals and~~] Subcontracts).

§101.557. Adoption of Rules.

In accordance with Government Code §2161.003, the Department of Assistive and Rehabilitative Services adopts the rules of the Texas Comptroller of Public Accounts, Texas Procurement and Support Services [~~Building and Procurement Commission~~] at 34 [~~1~~] TAC, Chapter 20 [~~111~~], Subchapter B (relating to Historically Underutilized Business Program), which rules were promulgated by the General Services Commission pursuant to Government Code, §2161.002.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 424-4050

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SUBCHAPTER D. COUNCILS AND COMMITTEES

40 TAC §§101.601, 101.603, 101.605

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§101.601. Rehabilitation Council of Texas.

(a) - (b) (No change.)

(c) Tasks. The council shall:

(1) - (3) (No change.)

(4) coordinate with other councils within the state, including the State Independent Living Council established under 29 United States Code §796d, the advisory panel established under §612(a)(20) of the Individuals with Disabilities Education Act 20 U.S. C. 1412 (a)(21), [~~20 United States Code §1431(a)(12),~~] the State [~~Planning~~] Council on Developmental Disabilities described in 42 United States Code §15025, [~~§6024,~~] and the State Mental Health Planning Council established under 42 United States Code §300x-3(a), and the State workforce investment board; [~~§300x-4(e);~~]

(5) - (6) (No change.)

(d) - (e) (No change.)

(f) Duration of council. The council will be abolished on August 31, 2011 [~~December 31, 2009~~].

§101.603. State Independent Living Council.

(a) Legal basis. The State Independent Living Council is created as an independent council pursuant to the Rehabilitation Act of 1973, as amended, 29 United States Code §796d. Failure to establish the council would prohibit federal financial assistance.

(b) - (d) (No change.)

(e) Duration of council. The council will be abolished on August 31, 2011 [~~December 31, 2009~~].

§101.605. Early Childhood Intervention Advisory Committee.

(a) - (s) (No change.)

(t) Duration. The committee will be abolished on August 31, 2011 [~~December 31, 2009~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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SUBCHAPTER I. ADMINISTRATIVE RULES AND PROCEDURES PERTAINING TO EARLY CHILDHOOD INTERVENTION SERVICES

DIVISION 2. AGENCY ADMINISTRATION

40 TAC §101.5641

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§101.5641. Employee Training and Education.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
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For further information, please call: (512) 424-4050

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CHAPTER 105. GENERAL CONTRACTING RULES

(Editor's note: The Texas Register has excluded from this issue proposed rulemaking documents for Title 40, Chapter 101, Subchapter E, relating to Appeals and Hearing Procedures, because the numbering scheme conflicted with existing sections of the 40 TAC Chapter 101; therefore, references to those rules in the Department of Assistive and Rehabilitative Services' other rulemaking documents may not be accurate.)

The Texas Health and Human Services Commission ("HHSC"), on behalf of the Texas Department of Assistive and Rehabilitative Services ("DARS"), proposes to amend the DARS rules in Title 40, Part 2, Chapter 105, General Contracting Rules, by amending Subchapter A, General Contracting Information, §105.1003, Definitions; Subchapter B, Contractor Requirements, §105.1013, General Requirements for Contracting; and Subchapter E, Adverse Actions, §105.1301, Adverse Actions.

Specifically, these amendments update existing administrative contracting procedures and clarify the definition of "contract-related records" in §105.1003(7), contractor requirements in §105.1013(a) and (f), and reasons DARS may impose adverse actions in §105.1301(a).

In accordance with Texas Government Code §2001.039, DARS conducted a four-year review of Title 40, Part 2, Chapter 105, of the DARS rules. Notice of the proposed rule review of Chapter 105 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863). DARS determined that the reasons for initially adopting these rules continue to exist. However, as a result of the review, DARS determined that amendments were needed to clarify and update existing administrative contracting procedures in accordance with state law as described above.

The following statutes and regulations authorize the proposed amendments: Texas Government Code, Chapters 2155, 2252, 2261, and 2262.

Bill Wheeler, Chief Financial Officer, Texas Department of Assistive and Rehabilitative Services, estimates that for each year of the first five years that the proposed amendments will be in effect, there will be no foreseeable fiscal implications for state or local government costs or revenues as a result of enforcing or administering the amendments.

Mr. Wheeler has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated as a result of enforcing the proposed amendments will be assurances to the public that the necessary rules are in place to increase efficiencies in the agency's contracting procedures.

Mr. Wheeler has also determined that there will be no probable economic cost to persons who are required to comply with the proposed amendments. Further, in accordance with Texas Government Code §2001.022, he has determined that the proposed amendments will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Mr. Wheeler has determined that the proposed amendments will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposal may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756.

SUBCHAPTER A. GENERAL CONTRACTING INFORMATION

40 TAC §105.1003

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§105.1003. Definitions.

The following words and terms, when used in this chapter and Chapter 101 of this title (relating to Administrative Rules and Procedures), shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (6) (No change.)

(7) Contract-related [~~Contractor~~] records--All financial and programmatic records, supporting documents, papers, statistical data, or any other written or electronic materials that are pertinent to each specific contract instrument.

(8) - (16) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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SUBCHAPTER B. CONTRACTOR REQUIREMENTS

40 TAC §105.1013

The amendment is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§105.1013. General Requirements for Contracting.

(a) To contract with the Department of Assistive and Rehabilitative Services (DARS) the contractor must:

(1) - (5) (No change.)

(6) [~~if applicable,~~] be authorized by law or the secretary of state to conduct business in the state of Texas;

(7) [~~if applicable,~~] certify in writing that the contractor's [~~corporate~~] taxes due to the state of Texas are current;

(8) - (13) (No change.)

(14) notify DARS in writing of changes to contract information according to the requirements of their contract. Unless otherwise specified in the contract, the contractor must notify DARS:

(A) within 10 calendar days after any address change, which includes the location of the agency's office, physical address, and/or mailing address;

(B) immediately of any change in administrator or director; [~~and~~]

(C) within seven working days of any change in the contact telephone number designated in the contract; [~~and~~]

(D) prior to any change in entity name or type; and

(E) within 10 calendar days of any change in legal status with the Texas Secretary of State; and

(15) report suspected violation of rules or laws to the appropriate investigative authority. This includes reporting abuse, neglect, and exploitation issues to the Texas Department of Family and Protective Services (DFPS) or to the appropriate Texas Department of Aging and Disability Services (DADS) licensing staff.

(b) - (e) (No change.)

(f) DARS may choose not to enter into a contract:

(1) when, in DARS' opinion, the contractor, potential contractor or a controlling party has a prior unsatisfactory history in contracting with DARS or with another Health and Human Services agency.

(2) if the contractor or potential contractor:

(A) subcontracts any direct care services without specific authorization from DARS; and/or

(B) assigns or transfers the contract without prior written approval of DARS.

(3) when DARS determines it is not in the best interest of DARS.

(g) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. ADVERSE ACTIONS

40 TAC §105.1301

The amendment is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§105.1301. Adverse Actions.

(a) The Department of Assistive and Rehabilitative Services (DARS) may impose an adverse action when the contractor fails to follow the terms of the contract and/or fails to comply with program rules, policies, and procedures. DARS may impose adverse actions for reasons including but not limited to:

(1) - (7) (No change.)

(8) the contractor's exclusion from contracting with DARS, [~~or with~~] any Health and Human Services program, or the federal government;

(9) validated report(s) of abuse, neglect, or exploitation when the perpetrator is an owner, employee, or volunteer who has direct access to consumers. [~~;~~]

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
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CHAPTER 106. DIVISION FOR BLIND SERVICES

(Editor's note: The Texas Register has excluded from this issue proposed rulemaking documents for Title 40, Chapter 101, Subchapter E, relating to Appeals and Hearing Procedures, because the numbering scheme conflicted with existing sections of the 40 TAC Chapter 101; therefore, references to those rules in the Department of Assistive and Rehabilitative Services' other rulemaking documents may not be accurate.)

The Texas Health and Human Services Commission ("HHSC"), on behalf of the Texas Department of Assistive and Rehabilitative Services ("DARS"), proposes to amend and repeal the DARS rules in Title 40, Part 2, Chapter 106, Division for Blind Services. This proposal amends Subchapter C, Vocational Rehabilitation Program by updating and/or clarifying legal references, removing obsolete language, and providing further clarification of the following rules: §§106.507, 106.509, 106.513, 106.521,106.527, 106.535, 106.551, 106.555, 106.557, 106.564, 106.568, 106.572, 106.582, 106.603, and 106.629; Subchapter D, Independent Living Programs, §§106.855, 106.859, and 106.933; Subchapter F, Blindness Education, Screening and Treatment Programs, §§106.1103, 106.1105, and 106.1107; and by amending the title to Subchapter F, to Blindness Education, Screening, and Treatment Program; Subchapter G, Business Enterprises of Texas, §106.1227 and §106.1229; Subchapter I, Blind Children's Vocational Discovery and Development Program, §§106.1445, 106.1475, 106.1487 and 106.1489; Subchapter K, Memoranda of Understanding, §106.1607; Subchapter L, Advisory Committees and Councils, §106.1703; and Subchapter M, Donations, §106.1815. Also, this proposal repeals Subchapter C, Vocational Rehabilitation Program, §106.511; Subchapter K, Memoranda of Understanding, §106.1605; and Subchapter L, Advisory Committees and Councils, §106.1701 and §106.1705.

The amendments and repeals are being proposed pursuant to the DARS four-year rule review of Chapter 106, as required by Texas Government Code §2001.039. In accordance with Texas Government Code §2001.039, DARS conducted its four-year review of Chapter 106. As a result of the review, DARS determined that the reasons for initially adopting these rules continue to exist. However, the review identified areas where amendments and repeals were needed to update and/or clarify legal references, remove obsolete language, and provide further clarification of rules provisions. Notice of the proposed rules review of Chapter 106 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8864).

The following statutes authorize the promulgation of the proposed rules: Rehabilitation Act of 1973, Section 701 et seq. (as hereafter amended), the Randolph-Sheppard Act, Texas Government Code, §2001.01 et seq., and Texas Human Resources Code Chapters 22, 35, and 91 (as hereafter amended).

Bill Wheeler, Chief Financial Officer, Texas Department of Assistive and Rehabilitative Services, estimates that for each year of the first five years that the proposed rules will be in effect, there will be no foreseeable fiscal implications for state or local government costs or revenues as a result of enforcing or administering the rules.

Mr. Wheeler has determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be assurances to the public that the necessary rules are in place to increase efficiencies in the agency's contracting procedures.

Mr. Wheeler has also determined that there will be no probable economic cost to persons who are required to comply with the proposed rules. Further, in accordance with Texas Government Code §2001.022, he has determined that the proposed rules will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Mr. Wheeler has determined that the proposed rules will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposal may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756.

SUBCHAPTER C. VOCATIONAL REHABILITATION PROGRAM

DIVISION 1. GENERAL INFORMATION

40 TAC §§106.507, 106.509, 106.513

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.507. Public Access to Forms and Documents.

(a) (No change.)

(b) The Division's rules are published on the Department of Assistive and Rehabilitative website at www.dars.state.tx.us. [~~Requests for copies are subject to the Division's rules regarding charges for public records.~~]

§106.509. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (14) (No change.)

(15) Individual with a most significant disability--An individual with a significant disability who:

(A) is seriously limited in four or more functional capacities (such as the inability to obtain or retain employment independently, obtain a driver's license without special optical accommodations, care for self independently, access standard print, travel independently, socially interact with others, access technology without special adaptations, or manage one's home independently) in terms of an employment outcome;

(B) requires, in addition to comprehensive assessment, counseling, guidance, and employment assistance, at least four other substantial vocational rehabilitation [~~VR~~] services; and

(C) needs services for a period of at least six months.

(16) - (34) (No change.)

§106.513. Service Delivery.

(a) - (b) (No change.)

(c) Reasonable Timeframes for Service Delivery. The following timeframes shall serve as benchmarks to service delivery staff and

monitoring staff in evaluating a consumer's progress towards the expected outcome in the service plan.

(1) Once an individual has submitted an application for services, an eligibility determination will be made within 60 days, unless exceptional and unforeseen circumstances beyond the control of the division [~~commission~~] precludes a determination within 60 days and the division [~~agency~~] and the individual agree to a specific extension of time; or a trial work period is necessary.

(2) - (5) (No change.)

(6) The division [~~agency~~] monitors and assists for not more than 120 days a consumer who has completed their services and is employed.

(7) (No change.)

(d) Financial planning information. Quarterly budget information shall be provided to division field [~~agency regional~~] directors. Field [~~Regional~~] directors will disseminate this information to all caseload carrying staff for financial planning purposes.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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40 TAC §106.511

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.511. Appeals of Determinations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
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For further information, please call: (512) 424-4050

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DIVISION 2. BASIC PROGRAM REQUIREMENTS

40 TAC §§106.521, 106.527, 106.535

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.521. Application.

(a) A person is considered to have submitted an application when the individual or the individual's representative, as appropriate:

(1) has completed and signed the division [~~agency's~~] application form or has otherwise requested services;

(2) has provided information necessary to initiate an assessment to determine eligibility and priority for services; and

(3) is available to complete the assessment process.

(b) (No change.)

§106.527. Eligibility Determination Time Frame.

(a) - (b) (No change.)

(c) Eligibility shall be determined prior to applying Division 4 of this subchapter, if appropriate (relating to Order of Selection for Services) and Division 5 of this subchapter (relating to Consumer Participation in Cost of Services).

§106.535. Individualized Plan for Employment (IPE).

(a) - (g) (No change.)

(h) Prior to suspending, reducing, or terminating any planned service in the IPE, the division [~~agency~~] shall send written notification of intent to the consumer's last known address.

(i) The division [~~agency~~] shall suspend, reduce or terminate a consumer's planned services no sooner than 10 working days after written notification has been mailed to the consumer.

~~[(j) The Division shall not institute a suspension, reduction, or termination of services being provided under an IPE in instances in which the consumer has filed a request for a formal hearing or informal review, pending final resolution unless the individual or, in an appropriate case, the individual's representative so requests or the agency has evidence that the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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DIVISION 3. VOCATIONAL REHABILITATION SERVICES

40 TAC §§106.551, 106.555, 106.557, 106.564, 106.568, 106.572, 106.582

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.551. Goods and Services.

(a) - (b) (No change.)

(c) Subject to the limitation prescribed in subsection (b) of this section, the following vocational rehabilitation services are available on an as-needed basis:

(1) - (5) (No change.)

(6) maintenance as defined in §106.559 of this title (relating to Maintenance; [~~§106.511 of this title (relating to Appeals of Determinations);~~]

(7) transportation as defined in §106.561 [~~§106.511~~] of this title (relating to transportation);

(8) - (12) (No change.)

(13) personal assistance services as defined in §106.574 [~~§106.511~~] of this title relating to Personal Assistance Services);

(14) post-employment services as defined in §106.568 [~~§106.511~~] of this title (relating to Post-Employment Services);

(15) occupational licenses, tools, equipment, and initial stocks and supplies;

(16) transition services as defined in §106.576 [~~§106.511~~] of this title relating to Transition Services;

(17) referral services;

(18) supported employment services as defined in §106.578 [~~§106.511~~] of this title (relating to Supported Employment Services);

(19) rehabilitation technology services as defined in §106.580 [~~§106.511~~] of this title relating to Rehabilitation Technology Services); and

(20) technical assistance and other consultation services.

(d) - (g) (No change.)

§106.555. Physical and Mental Restoration Services.

Whenever possible and practical, the consumer's choice of health professionals and appropriate facilities is honored, as long as such professionals and facilities are willing to accept reimbursement in accordance with the division's [~~commission's~~] maximum affordable payment schedule (MAPS).

§106.557. Vocational and Other Training Services.

(a) (No change.)

(b) Academic training in institutions of higher education (universities, colleges, community or junior colleges, vocational schools, technical institutes, or hospital schools of nursing) shall be subject to the following:

(1) (No change.)

(2) No academic training shall be paid from vocational rehabilitation funds unless maximum efforts have been made by the division [~~agency~~] and the consumer to secure grant assistance in whole or in part from other sources to pay for such training.

(3) - (12) (No change.)

§106.564. Interpreter Services and Note-taking Services for Individuals Who Are Deaf and Tactile Interpreting for Individuals Who Are Deaf-Blind.

If available, the Division shall use interpreters certified by the Department of Assistive and Rehabilitative Services [~~DARS~~], Division for Rehabilitation Services, Office for Deaf and Hard of Hearing Services or by the Registry of Interpreters in the delivery of services to persons who are deaf or deaf-blind.

§106.568. Post-Employment Services.

(a) (No change.)

(b) Post-employment services must be incidental to the original impediment to employment, ancillary to the services provided through the consumer's individualized plan of employment [~~IPE~~], and related to the previously planned vocational goal.

§106.572. Occupational Licenses, Tools, Equipment, and Initial Stocks and Supplies.

(a) - (e) (No change.)

(f) The consumer must take reasonable care of tools, equipment, and supplies provided by the division [~~commission~~] and shall be liable for its loss and damage resulting from wrongful act or neglect.

§106.582. Establishing a Small Business as an Employment Outcome.

(a) - (k) (No change.)

(l) After reviewing the proposal and business plan pursuant to the requirements of this section, the Division shall notify the consumer in a format accessible to the consumer if the plan has been approved as an employment outcome and whether the Division shall provide funding and, if so, the extent of such funding as well as any other assistance to be provided to the consumer in establishing the small business. [~~Appeals of decisions not to approve a plan or to fund a plan may be filed in accordance with procedures contained in §101.811, et seq., of this title, pertaining to appeals and hearing procedures.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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DIVISION 4. ORDER OF SELECTION FOR SERVICES

40 TAC §106.603

The amendment is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531,

§531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.603. Application.

(a) In determining whether to invoke an order of selection, the Assistant Commissioner for the Blind Services shall apply the criteria set out in 29 U.S.C. §709 and in 34 C.F.R. §361.36 as amended and in the State Plan;

(b) The order of selection is applied after eligibility for services is determined.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
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DIVISION 5. CONSUMER PARTICIPATION IN COST OF SERVICES

40 TAC §106.629

The amendment is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.629. Maximum Allowable Amount.

(a) Economic resources in excess of the amount allowed by the division [~~commission~~] must be used to pay for the cost of vocational rehabilitation services. Maximum allowable amounts are contained in an Economic Resources Table available at any division [~~commission~~] office and may be obtained in accordance with §163.3 of this title (relating to Public Access to Forms and Documents).

(b) The maximum allowable amount may fluctuate according to relevant factors, such as established federal and state poverty levels, the funds available to the division [~~commission~~] for services, and the number of persons meeting the definition of family.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. INDEPENDENT LIVING PROGRAM
DIVISION 1. GENERAL INFORMATION

40 TAC §106.855, §106.859

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.855. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) - (7) (No change.)

(8) Individual with a [~~significant~~] disability--An individual with a visual impairment whose ability to function independently in the family or community or whose ability to obtain, maintain, or advance in employment is substantially limited and for whom the delivery of independent living services will improve the ability to function, continue functioning, or move toward functioning independently in the family or community or to continue in employment, respectively.

(9) Individual with a significant disability - An individual with a disability as defined in paragraph (8) of this section.

(A) who has a severe physical or mental impairment that seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills) in terms of independent living;

(B) whose independent living program can be expected to require multiple independent living rehabilitation services over an extended period of time; and

(C) who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), spinal cord conditions (including paraplegia and quadriplegia), sickle cell anemia, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and independent living needs to cause comparable substantial functional limitation.

(10) [~~(9)~~] Representative--A parent, legal guardian, or other representative appointed by the court to represent the individual or an advocate or other family member designated in writing by the individual to represent the individual.

(11) [~~(10)~~] Transportation--Travel and related expenses that are necessary to enable a consumer to benefit from another independent living service and travel and related expenses for an attendant or aide if the services of that attendant or aide are necessary to enable an individual with a significant disability to benefit from that independent living service.

(12) [~~(11)~~]Visual impairment--A visual acuity, with best correction, of 20/70 or less in the better eye, or a visual field of 30 degrees or less in the better eye, or a combination of both.

§106.859. Service Delivery.

(a) - (b) (No change.)

(c) Reasonable Timeframes for Service Delivery. The following timeframes shall serve as benchmarks to service delivery staff and monitoring staff in evaluating a consumer's progress towards the expected outcome in the service plan.

(1) An eligibility decision will normally be made within 60 days from the time an application for services has been completed unless exceptional and unforeseen circumstances beyond the control of the Division [~~commission~~] precludes a determination.

(2) Once an individual is determined eligible, a plan of services will normally be developed and agreed to within 90 days.

(3) A consumer will normally complete all planned services within 18 months.

(4) Post-closure services will normally not exceed 6 months.

(d) Financial planning information. Quarterly budget information shall be provided to agency field [~~regional~~] directors. Field [~~Regional~~] directors will disseminate this information to all caseload carrying staff for financial planning purposes.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
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Department of Assistive and Rehabilitative Services
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DIVISION 5. CONSUMER PARTICIPATION IN COST OF SERVICES

40 TAC §106.933

The amendment is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.933. Scope.

All goods and services provided under this chapter are subject to this subchapter except the following:

(1) - (7) (No change.)

(8) Criss Cole Rehabilitation Center training (includes transportation to and from the center); [~~and~~]

(9) services paid for or reimbursed by a source other than the Division; and [~~.~~]

(10) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. BLINDNESS EDUCATION, SCREENING, AND TREATMENT PROGRAM

40 TAC §§106.1103, 106.1105, 106.1107

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1103. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Division--Department of Assistive and Rehabilitative Services, Division for Blind Services.

(2) Resident--An individual who is physically present within the geographic boundaries of Texas; has an intent to remain within the state, either permanently or for an indefinite period; and actually maintains an abode (e.g., house, apartment, etc., but not merely a post office box) within this state.

(3) Program--[~~The~~] Blindness Education, Screening, and Treatment Program.

(4) Vision Screening--A nondiagnostic procedure that uses uniform testing techniques to assess the person's risk of vision loss and eye disease.

§106.1105. Vision Screening Services.

(a) - (b) (No change.)

(c) Vision screenings shall be conducted by:

(1) Persons who have attended and completed vision screening training from the Texas Department of State Health Services [~~Division of Health~~] and are currently certified as vision screeners; or

(2) Persons who have been trained by a vision screener currently certified by the Texas Department of State Health Services as a vision screener; or

(3) - (4) (No change.)

(d) (No change.)

(e) When a referral is made for an eye examination to another agency or organization, the referral agency or organization's rules shall apply. A referral by the BEST program is not an endorsement of another agency, organization or eye care professional by the Division [~~Department of Assistive and Rehabilitative Services, Division for Blind Services~~].

§106.1107. Treatment Services.

(a) - (h) (No change.)

(i) Payments for treatment services shall be based on the Division's [~~agency's~~] adopted rate schedule for eye-related medical services as specified in Human Resources Code, §117.074, [~~§101.3611 of this title~~] (also known as the Division's [~~agency's~~] Maximum Affordable Payment Schedule).

(j) - (k) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER G. BUSINESS ENTERPRISES OF TEXAS

40 TAC §106.1227, §106.1229

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1227. Administrative Action Based on Unsatisfactory Performance.

(a) - (b) (No change.)

(c) Types of administrative actions. There are five types of administrative actions based on unsatisfactory performance:

(1) Written reprimand. Written reprimand means a formal statement describing violations of applicable law, these rules, the requirements of the BET manual, or any proper and authorized instruction by DARS/DBS personnel.

(2) Probation. Probation means allowing a licensee to continue in BET in an effort to satisfactorily remedy a condition that is not acceptable under these rules. If the condition causing probation is satisfactorily remedied within the time periods specified in the written notice of probation, the probation will be lifted. If the unacceptable condition is not remedied within the time specified, additional and more serious administrative actions may ensue. When a licensee who has been on probation three times in a three-year period qualifies for probation for the fourth time within said three years, the licensee's license may be revoked according to DARS/DBS procedures.

(3) Loss of facility. Loss of facility means the removal of a manager from the manager's current facility for administrative reasons when the manager's actions or inactions are endangering the state's investment in the facility.

(4) Termination. Termination means the cessation of a license issued to a licensee to operate a facility and the removal of the individual from BET.

(5) Emergency Removal of Manager.

(A) A manager may be summarily removed from a facility in an emergency. An emergency shall be deemed to exist when, in the reasonable judgment of the DARS/DBS, the DARS/DBS, in consultation with the ECM chairman, determines that some act or acts or some failure to act of that manager or any person who is an employee, servant or agent of such manager, will, if such removal does not occur:

(i) result in a clear danger to the health, safety or welfare of any person or to the property of any person in, on or around the facility; or

(ii) result in a deterioration of the existing or future relationship with the host, thereby putting the continuation of the facility in jeopardy; or

(iii) present a clear potential of substantial loss or damage to the property of the State of Texas.

(B) In any case in which a manager has been summarily removed from a facility on an emergency basis for any of the reasons set forth in subparagraph (A) of this subsection, the manager shall be entitled to have a hearing as to the issue of a necessity of the summary removal within ten days after the removal has occurred.

(C) The time period for such hearing may be extended only by mutual agreement of the manager and the DARS/DBS, provided that if an official holiday of the State of Texas falls within the time period then the period shall be extended by the time of such holiday; or if the services of an arbitrator cannot be obtained in time to afford the hearing within the time period, then the time period shall be extended by the time necessary to obtain the services of such arbitrator and schedule the hearing.

(D) If the manager desires to have such a hearing, the manager shall notify the DARS/DBS in writing within 48 hours following the removal. Such written notification need only state the name of the manager, the location of the facility, and that the manager desires to have a hearing as to the issue of the need for summary removal. The request may be delivered to [~~the BET director,~~] the Assistant Commissioner, or the BET director, as the Assistant Commissioner's designee [~~any local DARS/DBS BET staff member in the geographical area in which the facility is located~~].

(E) Upon receipt of any such request the BET director shall obtain the services of an arbitrator from the American Arbitration Association ("AAA") or other similar organization to conduct the hearing.

(F) The manager shall be notified of the date, time and place of the hearing. To the extent possible, the hearing shall be conducted in an area near the location of the facility.

(G) The hearing shall be conducted in accordance with the rules of the American Arbitration Association, except that the arbitrator shall be requested to announce orally a decision at the conclusion of the hearing.

(H) If the arbitrator determines that no emergency necessitating the removal of the manager existed, then the manager shall be forthwith restored to the operation of the facility.

(I) No determination made as a result of the hearing shall operate to prejudice the rights of the manager to proceed with a grievance in accordance with the terms of these rules and the Randolph-Sheppard Act.

(d) Administrative action procedures.

(1) From among those administrative actions listed in subsection (c) of this section, [~~The~~] DARS/DBS shall decide which [~~make the decision as to what~~] administrative action to take based upon the seriousness of the violation, the damage to BET, and the licensee's record.

(2) - (4) (No change.)

(e) Prior to termination of a license, the DARS/DBS shall afford the licensee an opportunity for a full evidentiary hearing. The provisions of the Randolph-Sheppard Act, these rules and the Texas Government Code §2001.051 et seq., shall govern the conduct of the hearing.

§106.1229. Procedures for Resolution of Manager's Dissatisfaction.

(a) - (d) (No change.)

(e) Informal procedures to review dissatisfactions. At the request of a licensee, the DARS/DBS shall arrange for and participate in informal meetings in an effort to quickly resolve a matter of dissatisfaction arising from the operation or administration of BET. The informal process is for the purpose of quickly and amicably resolving an issue in controversy. It is not for the purpose of denying or delaying the manager's right to pursue resolution of a matter through a full evidentiary hearing. At any point during the informal process, either party may elect to terminate the following procedures:

(1) - (6) (No change.)

(7) The provisions concerning mediation under Chapter 101, Subchapter E of this title (relating to Appeals and Hearing Procedures) shall not apply to or control the informal resolution procedures in this subchapter.

(f) Full evidentiary hearing. A manager has the right to request a full evidentiary hearing to resolve a dissatisfaction according to the following:

(1) - (8) (No change.)

(9) Selection of the Hearing Officer [~~The presiding officer at the hearing shall be an impartial and qualified official who has not involvement either with the DARS/DBS action which is at issue or with the administration or operation of BET~~].

(A) The Hearings Coordinator, DARS Legal Services, shall select, on a random basis, a hearing officer from a pool of persons qualified according to these rules.

(B) The hearing officer shall be an impartial and qualified individual who:

(i) has no involvement either with the DARS/DBS action which is at issue or with the administration or operation of BET;

(ii) is not an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education);

(iii) has knowledge of the Randolph-Sheppard Act and any applicable state and federal regulations governing the appeal;

(iv) has received training specified by the Department with respect to the performance of official duties; and

(v) has no personal, professional, or financial interest that would be in conflict with the objectivity of the individual.

(C) An individual is not considered to be an employee of a public agency for the purposes of clause (ii) of this subparagraph solely because the individual is paid by the agency to serve as a hearing officer.

(10) Hearings shall be conducted in accordance with the Randolph-Sheppard Act, Texas Government Code §2001.051 et seq., and these rules[~~, and the State Office of Administrative Hearings (SOAH) procedures for hearing contested case hearings contained in 1 TAC §105.1 et seq.~~] to the extent those procedures do not conflict with the Act and its implementing regulations or these rules.

(11) Licensees bringing complaints shall have the burden of proving their cases by the preponderance of evidence. Licensees shall present their evidence first. When a hearing is requested as a result of administrative action by the DARS/DBS against a licensee, the DARS/DBS shall have the burden of proving its case by a preponderance of the evidence and shall present its evidence first.

(12) Transcription of Proceedings. [~~A record shall be made of the evidence and shall be made available to the parties by the DARS/DBS no later than the 30th business day after the close of the hearing.~~]

(A) Unless precluded by law, the hearing shall be recorded electronically by tape recorder or similar device either by the hearing officer or by someone designated by the hearing officer. Such tape recording shall be the official record of the testimony adduced during the hearing. Any party, however, may request, at the party's expense, that the hearing be recorded by a court reporter if the request is made within ten (10) days of the date for the hearing.

(B) In lieu either of a recording of the testimony electronically or of the reporting of testimony by a court reporter, the parties to a hearing may agree upon a statement of the evidence, agree to use taped transcription as a statement of the testimonial evidence, or agree to the summarization of testimony before the hearing officer; provided, however, that proceedings or any part of them must be transcribed on written request of any party.

(C) Unless otherwise provided in this subchapter, the party requesting a transcription of any electronic recording of the proceedings shall bear the cost for the transcribing of any such electronically recorded testimony. Nothing provided for in this section limits the Department to a stenographic record of the proceedings.

(D) The record of the proceedings, including exhibits and any transcription shall be made available to the parties by the DARS/DBS no later than the 30th business day after the close of the hearing.

(13) - (16) (No change.)

(17) The Assistant Commissioner shall review the recommendation of the hearing officer and forward a decision to the manager no later than the 20th business day after receipt of the hearing officer's recommendation. The Assistant Commissioner's decision shall

include findings of fact and conclusions of law based on the evidence in the record and separately stated.

(18) Subject to the provisions of Texas Government Code §2001.144 and §2001.146, the Assistant Commissioner's decision shall be the final decision of the Department. Any such decision becomes the final decision of the Department if a timely motion for rehearing or reconsideration is not filed.

(g) Arbitration. A manager appealing the DARS/DBS decision must file a complaint with the Secretary of Education in conformity with the provisions of the implementing regulations at 34 CFR, part 395.13 of the Act, pertaining to arbitration of vendor complaints.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
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SUBCHAPTER I. BLIND CHILDREN'S VOCATIONAL DISCOVERY AND DEVELOPMENT PROGRAM
DIVISION 3. SERVICES

40 TAC §106.1445

The amendment is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1445. Assessment Services.

(a) (No change.)

(b) Services in this section, with the exception of purchasing copies of existing records, are subject to application of Division 4 of this subchapter (relating to Economic Resources) and Division 5 of this subchapter (relating to Order of Selection for Payment of Services).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 4. ECONOMIC RESOURCES

40 TAC §106.1475

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1475. Determination.

(a) The parent's economic resources shall be determined before the Division [~~Commission~~] authorizes the purchase of certain services contained in Subchapter C of this chapter (relating to Services).

(b) (No change.)

(c) Parents have the right to not disclose their economic resources. When this information is not disclosed, economic resources shall be determined by the Division [~~Commission~~] to be in excess of the allowable amounts.

(d) To determine the parent's participation in the cost of services that require an expenditure of BCVDD Program funds, the Division [~~Commission~~] shall consider the parent's gross monthly income, the number of family members for which the parent has financial responsibility, and the type of services the child is receiving. These factors shall be applied to percentages of the federal poverty level. The federal poverty level fluctuates and is periodically reviewed by the Division [~~Commission~~]. Updates to agency operating procedures are made in keeping with the federal poverty guidelines and the agency's operating budget. Information about the existing federal poverty level, categories of services, and percentage levels in use by the Division [~~Commission~~] is available by calling any Division [~~Commission~~] office and requesting the information.

(e) Parents with gross monthly incomes at or below the percentage of federal poverty level in use by the Division [~~Commission~~] shall not be required to participate in the cost of services that require an expenditure of BCVDD Program funds. Parents with gross monthly incomes above the applied federal poverty level shall be required to participate. In making this decision, the Division [~~Commission~~] shall consider extenuating circumstances which may prohibit the parent's ability to participate, such as medical costs and debts resulting from a permanent disability or chronic illness of the child or family member.

(f) (No change.)

(g) Gross monthly income at application for services shall be based on the family's current month's income or the average gross income for the previous three months, whichever is less, and shall be updated periodically as deemed necessary by the Division [~~Commission~~].

(h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 5. ORDER OF SELECTION FOR PAYMENT OF SERVICES

40 TAC §106.1487, §106.1489

The amendment is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1487. Application of Order of Selection.

(a) In determining whether to invoke an order of selection, the Assistant Commissioner for Blind Services shall apply the same criteria as that used in §106.603 of this title (relating to Application). [~~The order of selection is applied after eligibility for services is determined.~~]

(b) The order of selection is applied after eligibility for services is determined. [~~A service that can be paid from resources other than the Division's may be provided to a child regardless of the order of selection.~~]

(c) A service that can be paid from resources other than the Division's may be provided to a child regardless of the order of selection.

§106.1489. Order of Selection Expenditure Categories.

Order of Selection expenditure categories, from most restrictive to least restrictive, are:

(1) - (2) (No change.)

(3) Category C--Expenditure of case service funds authorized for any planned, necessary BCVDD Program services according to the following priorities:

(A) - (C) (No change.)

(D) Priority 4--Children who have a nonsevere visual loss and a degenerative eye condition that will result in a severe visual loss. [~~Children who are certified as visually impaired by a local education agency;~~]

(E) Priority 5--Children who are certified as visually impaired by a local education agency. [~~Children who have a nonsevere visual loss and a degenerative eye condition that will result in further visual loss;~~]

(F) - (G) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER K. MEMORANDA OF UNDERSTANDING

40 TAC §106.1605

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1605. Transition Planning for Students Receiving Special Education.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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40 TAC §106.1607

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1607. Continuity of Care System for Offenders with Physical Disabilities.

(a) The Texas Department of Assistive and Rehabilitative Services (department) adopts by reference a memorandum of understanding (MOU) between the Texas Department of Criminal Justice, Department of Aging and Disability Services, and Department of State Health Services. The MOU contains the agreement required by Texas Health and Safety Code §614.014 and §614.015 to establish the respective responsibilities of these agencies to institute a continuity of care and service program for offenders in the criminal justice system

who are physically disabled, the elderly, terminally or significantly ill, and the mentally retarded.

(b) The MOU is adopted by rule in 37 TAC §159.19 (relating to Continuity of Care and Service Program for Offenders with Physical Disabilities, the Elderly, the Significantly or Terminally Ill and the Mentally Retarded.

(c) The effective date of the MOU, with respect to the department is the same as the effective date of this section. [~~The Commission adopts by reference 37 TAC §159.5, which sets forth the terms of a memorandum of understanding between the Texas Department of Criminal Justice, the Texas Commission for the Blind, the Texas Commission for the Deaf and Hearing Impaired, the Texas Department of Human Services, the Texas Rehabilitation Commission, and the Texas Department of Health. The memorandum provides for a continuity of care system for offenders with physical disabilities.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER L. ADVISORY COMMITTEES AND COUNCILS

40 TAC §106.1701, §106.1705

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1701. Establishment of Advisory Committees and Councils.
§106.1705. Committees and Councils Established by the Board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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40 TAC §106.1703

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1703. Mandated Advisory Committees.

[~~(a) Consumer Advisory Committee.~~]

[~~(1) Legal basis. The Consumer Advisory Committee (CAC) is created pursuant to the Human Resources Code, §91.018.~~]

[~~(2) Purpose. The CAC is mandated by the Human Resources Code to provide individuals and groups interested in services to persons with visual impairments with a means of expressing their views about the delivery of rehabilitation services.~~]

[~~(3) Reporting requirements. The CAC serves in a consultative role to the agency and makes written recommendations to the executive director.~~]

[~~(4) Tasks. The CAC advises and consults with the executive director regarding program development and implementation of policies and programs and brings local issues pertaining to the programs to the attention of the agency.~~]

[~~(5) Membership. The Consumer Advisory Committee shall be comprised of the chairperson of each Regional Advisory Committee established pursuant to §172.3 of this title (relating to Committees and Councils Established by the Board) and additional persons appointed by the executive director to ensure representation of Texas organizations of and for the blind on the committee and to ensure diversity of race, gender, age, and other factors as determined necessary by the executive director to adequately reflect the agency's target population. Members shall serve two-year staggered terms.~~]

[~~(6) Presiding member. The committee selects from among its members a presiding member.~~]

[~~(7) Duration. The statute that requires this advisory committee contains no end date.~~]

[~~(b)~~] Elected Committee of Managers.

(1) Legal basis. The Elected Committee of Managers (ECM) is created pursuant to 20 USCA §107b(1) of Chapter 6A of Title 20, known as the Randolph-Sheppard Act.

(2) Purpose. The purpose of the ECM is to comply with the Randolph-Sheppard Act, which requires the agency, as the state licensing agency in Texas under the Act, to provide for the biennial election of a State Committee of Blind Vendors which, to the extent possible, is fully representative of all blind vendors in the state.

(3) Tasks. The ECM:

(A) actively participates with the agency in major administrative decisions and policy and program development decisions affecting the overall administration of the state's vending facility program;

(B) receives and transmits to the agency grievances at the request of blind vendors and serves as advocates for such vendors in connection with such grievances;

(C) actively participates with the agency in the development and administration of a state system for the transfer and promotion of blind vendors;

(D) actively participates with the agency in the development of training and retraining programs for blind vendors; and

(E) sponsors, with the assistance of the agency, meetings and instructional conferences for blind vendors within the state.

(4) Membership. The ECM is composed of elected representatives who are representative of all managers in the program based on geography and vending facility type and size.

(5) Presiding member. The ECM selects from its membership a presiding member.

(6) Duration. This advisory committee will continue as long as the federal law that requires it remains in effect. Failure to establish the ECM would suspend the agency's designation, under federal regulations, as the state licensing agency.

~~[(c) Statewide Independent Living Council.]~~

~~[(1) Legal basis. The Statewide Independent Living Council (SILC) is created pursuant to the Rehabilitation Act of 1973, §705, as amended, 29 United States Code §796d.]~~

~~[(2) Purpose. The purpose of the SILC is to comply with federal requirements.]~~

~~[(3) Reporting requirements. The SILC:]~~

~~[(A) submits to the federal government such periodic reports as the federal government requests; and]~~

~~[(B) jointly develops and submits, in conjunction with the Texas Commission for the Blind, the state plan for independent living services as required by federal law.]~~

~~[(4) Tasks. The SILC:]~~

~~[(A) develops and submits the reports enumerated in subsection (c) of this section;]~~

~~[(B) keeps such records as the federal government finds necessary to verify such reports;]~~

~~[(C) monitors, reviews, and evaluates the implementation of the independent living state plan;]~~

~~[(D) coordinates activities with other councils that address the needs of specific disability populations and issues under other federal law; and]~~

~~[(E) ensures that all regularly scheduled meetings of the council are open to the public and sufficient advance notice is provided.]~~

~~[(5) Membership. Members are appointed by the governor after soliciting recommendations from representatives of organizations representing a broad range of individuals with disabilities and organizations interested in individuals with disabilities. Employees of the Texas Rehabilitation Commission and the Texas Commission for the Blind are not eligible for appointment.]~~

~~[(6) Presiding member. The committee selects from its membership a presiding member.]~~

~~[(7) Duration. This advisory committee will continue as long as the federal law that requires it remains in effect. Failure to establish the SILC would prevent the agency from receiving federal financial assistance.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 424-4050

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SUBCHAPTER M. DONATIONS

40 TAC §106.1815

The amendment is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1815. Standards of Conduct between Employees and Officers and Private Donors.

(a) - (c) (No change.)

(d) An officer or employee shall not make personal investments in association with a private donor which could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the interest of the division [~~commission~~].

(e) An officer or employee shall not solicit, accept, or agree to accept any benefit for having exercised his/her official powers on behalf of a private donor or performed his official duties in favor of private donor.

(f) An officer or employee who has policy direction over the division [~~commission~~] and who serves as an officer or director of a private donor shall not vote on or otherwise participate in any measure, proposal, or decision pending before the private donor if the division [~~commission~~] might reasonably be expected to have an interest in such measure, proposal, or decision.

(g) An officer or employee shall not authorize a private donor to use property of the division [~~commission~~] unless the property is used in accordance with a contract between the division [~~commission~~] and the private donor, or the division [~~commission~~] is otherwise compensated for the use of the property.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 107. DIVISION FOR REHABILITATION SERVICES

(Editor's note: The Texas Register has excluded from this issue proposed rulemaking documents for Title 40, Chapter 101, Subchapter E, relating to Appeals and Hearing Procedures, because the numbering scheme conflicted with existing sections of the 40 TAC Chapter 101; therefore, references to those rules in the Department of Assistive and Rehabilitative Services' other rulemaking documents may not be accurate.)

The Texas Health and Human Services Commission ("HHSC"), on behalf of the Texas Department of Assistive and Rehabilitative Services ("DARS"), proposes new rules, amendments, and repeals to the DARS rules in Title 40, Part 2, Chapter 107, Division for Rehabilitation Services, Subchapter B, Vocational Rehabilitation Services Program; Subchapter F, Independent Living Services Program; Subchapter L, Comprehensive Rehabilitation Services; and Subchapter N, Memoranda of Understanding with Other State Agencies.

Specifically, DARS proposes to amend Subchapter B, Division 1, Provision of Vocational Rehabilitation Services, §§107.101, 107.107, 107.111, 107.113, 107.115, 107.121, 107.123, 107.125, 107.129, 107.131, 107.133, 107.135, 107.137, and 107.139; the repeal of §107.103; and an amendment to Division 3, Comparable Benefits, §107.173; the amendment of Division 4, Eligibility and Ineligibility §§107.191, 107.195, and 107.197 and new §107.199; and the amendment of Division 5, Methods of Administration of Vocational Rehabilitation §§107.215, 107.219, 107.221, 107.223, and 107.225; the amendment of Subchapter F, Independent Living Services Program, §§107.801, 107.803, 107.805, 107.807, 107.809, and new §107.806, the amendment of Subchapter L, Comprehensive Rehabilitation Services, §107.1201 and §107.1207 an amendment to Subchapter N, Memoranda of Understanding With Other State Agencies §107.1601 and the repeal of §§107.1607, 107.1609, and 107.1613.

These new rules, amendments, and repeals are being proposed pursuant to DARS' four-year rule review of Chapter 107, as required by Texas Government Code §2001.039. Notice of the proposed rule review of Chapter 107 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8863). As a result of the review, DARS determined that the reasons for initially adopting these rules continue to exist. However, the review identified areas where new rules, amendments, and repeals are needed to remove rules that apply only to DARS's legacy agency, to delete outdated memoranda of understanding, for greater clarity and consistency with state and federal statutes and regulations, and for greater consistency with the vocational rehabilitation rules of the DARS Division for Blind Services.

The following statutes and regulations authorize the proposed new rule, the amendments, and the repeals: the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 et seq.; Texas Human Resources Code, Chapters 111 and 117.

Bill Wheeler, DARS Chief Financial Officer, estimates that for each year of the first five years that the proposal will be in effect, there will be no foreseeable fiscal implications for state or local government costs or revenues as a result of enforcing or administering the proposal.

Mr. Wheeler has determined that for each year of the first five years the proposal will be in effect, the public benefit anticipated as a result of enforcing the proposal will be assurances to the public that the necessary rules are in place to increase efficiencies in the agency's delivery of vocational rehabilitation services, independent living services, and comprehensive rehabilitation services. He has also determined that there will be no probable economic cost to persons who are required to comply with the proposal.

Further in accordance with Texas Government Code §2001.022, Mr. Wheeler has determined that the proposal will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Mr. Wheeler has determined that the proposal will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposal may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756.

SUBCHAPTER B. VOCATIONAL REHABILITATION SERVICES PROGRAM

DIVISION 1. PROVISION OF VOCATIONAL REHABILITATION SERVICES

40 TAC §§107.101, 107.107, 107.111, 107.113, 107.115, 107.121, 107.123, 107.125, 107.129, 107.131, 107.133, 107.135, 107.137, 107.139

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.101. Basic Criteria.

(a) The Vocational Rehabilitation Services Program is a joint state-federal funded program. The Division cooperates with the federal government in carrying out the rehabilitation of individuals with disabilities under state and federal law and to this end adopts such methods of administration as are found by the federal government to be necessary and not contrary to existing state laws for the proper and efficient operation of such rehabilitation program. The Division complies with such requirements as may be necessary to obtain federal funds in the maximum amount and most advantageous proportion authorized.

(b) The State Plan for Vocational Rehabilitation Services is a binding contract between the federal government and the Department, and all rules in this subchapter must be interpreted in a manner consistent with state and federal law and with the State Plan. The State Plan is available on the Department's Internet site.

§107.107. Preliminary and Comprehensive Assessment.

(a) (No change.)

(b) Comprehensive assessment. If additional information is needed to determine the appropriate employment outcome and services required to achieve it, the [~~The~~] Division, as appropriate in each case, shall conduct a comprehensive assessment of the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and needs, including the need for supported employment services, of an eligible individual, in the most integrated setting possible, consistent with the

informed choice of the individual. The comprehensive assessment is limited to information that is necessary to identify the rehabilitation needs of the individual and develop the IPE and may, to the extent needed, include:

(1) an analysis of pertinent medical, psychological, vocational, educational, and other related factors that [~~which~~] bear on the individual's impediment to employment and rehabilitation needs. Additional examinations are authorized after services are initiated when conditions arise that jeopardize the individual's plan for employment;

(2) - (4) (No change.)

(c) (No change.)

§107.111. Physical Restoration Services.

(a) The Division provides physical restoration services that [~~which~~] are necessary to correct or substantially modify an individual's physical condition within a reasonable period of time. The physical conditions for which such services are rendered must be stable or slowly progressive.

(b) (No change.)

§107.113. Mental Restoration Services.

(a) The Division provides mental restoration services for mental conditions that [~~which~~] are stable or slowly progressive.

(b) (No change.)

(c) The Division provides psychotherapy as a limited service only to support the completion or achievement of the employment goal [~~vocational objective~~].

(d) The Division provides mental restoration services utilizing only physicians licensed by the state and skilled in the diagnosis and treatment of mental or emotional disorders, psychologists licensed or certified in accordance with state law, Licensed Clinical [~~Master~~] Social Workers[~~-advanced clinical practitioners~~] who are licensed by the Texas State Board of Social Work Examiners or Licensed Professional Counselors who are licensed by the Texas State Board of Examiners of Professional Counselors.

§107.115. Vocational and Other Training Services.

(a) - (d) (No change.)

(e) The Division will not pay tuition and fees to a business, technical, or vocational school in excess of the published fees. [~~Textbooks supplied to consumers of the Division become the property of the consumer provided the consumer finishes the prescribed training and enters a field of employment compatible with the employment goal. If the consumer drops out of training or enters employment not related to the vocational objective, the textbooks remain the property of the Division.~~]

§107.121. Interpreter Services for the Deaf and Hard of Hearing.

(a) The Division may provide interpreter services for consumers who are deaf or hard of hearing when such services will assist in the attainment of the rehabilitation objective.

(b) (No change.)

§107.123. Job Placement.

(a) The principal objective of vocational rehabilitation services is a competitive employment outcome for each consumer that [~~which~~] is consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(b) (No change.)

§107.125. Postemployment Services.

(a) (No change.)

(b) Postemployment services are those services that [~~which~~] are necessary for the individual to maintain, regain or advance in an employment outcome that [~~which~~] is consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

§107.129. Extended Evaluation.

(a) - (c) (No change.)

(d) Where an individual is determined ineligible for vocational rehabilitation services after extended evaluation, the Division conducts a periodic review at least annually of the ineligibility decision in which the individual is afforded a clear opportunity for full consultation in the reconsideration of such decision. A periodic review is not required when the individual has refused services, has refused a periodic review, is no longer present in the state, the individual's whereabouts are unknown, or the medical condition is rapidly progressive or terminal.

§107.131. Individualized Plan for Employment.

(a) - (b) (No change.)

(c) The consumer may develop all or part of the IPE with or without assistance from a DRS Counselor, a qualified vocational rehabilitation counselor not employed by DRS, or another resource outside of DRS. DRS will not pay for non-DRS assistance with IPE development. The IPE is not final until approved by the DRS counselor. A copy of such plan [~~program~~] and any amendments thereto are provided to the consumer or, as appropriate, the consumer's parent, guardian, or other representative.

(d) (No change.)

(e) The counselor shall advise the consumer of the consumer's rights and the means by which the consumer may express and seek remedy for dissatisfaction with the plan [~~program~~], including the opportunity for an administrative review of Division action and a fair hearing in accordance with the Administrative Procedure [~~and Texas Register~~] Act, Texas Government Code Chapter 2001, and rules in Chapter 101 of this title (relating to Administrative Rules and Procedures) [~~§13 and §14~~].

(f) The counselor reviews the individualized plan for employment as often as necessary, but at least on an annual basis, at which time each consumer, or as appropriate, the consumer's parent, guardian, or other representative, is afforded an opportunity to review such plan [~~program~~] and, if necessary, jointly redevelop its terms.

(g) The individualized plan for employment is a joint commitment that [~~which~~] must be signed by both the counselor and the individual.

(h) The Division may provide only those goods and services that [~~which~~] can reasonably be expected to benefit an individual with a disability in terms of employment.

§107.133. Cooperative Programs Utilizing Third-Party Funds.

When the Division enters into a third-party cooperative arrangement for providing or administering vocational rehabilitation services with another state agency or a local public agency that is furnishing part or all of the non-federal share, then to the extent that the services will be counted as non-federal share [~~the state plan will assure that~~]:

(1) the services provided by the cooperating agency must [~~are~~] not be the customary or typical services provided by that agency but [~~are~~] new services that have a vocational rehabilitation focus or

existing services that have been modified, adapted, expanded or reconfigured to have a vocational rehabilitation focus;

(2) the services provided by the cooperating agency must be [~~are only~~] available only to applicants for, or recipients of, services from the Division;

(3) program expenditures and staff providing services under the cooperative arrangement must be [~~are~~] under the administrative supervision of the Division; and

(4) (No change.)

§107.135. Participation in Political Activity.

Employees of the Division engaged in day-to-day administration and operation of the vocational rehabilitation program will not engage in political activity prohibited by the Hatch Act, 5 United States Code, Chapter 15 [~~1501~~], or state law.

§107.137. Consultation Regarding the Administration of the State Plan.

(a) The state plan must assure that, in connection with matters of general policy development and implementation arising in the administration of the state plan, the Division seeks and takes into account the views of:

(1) - (3) (No change.)

(4) the Client Assistance Program (CAP) [~~CAP~~] director; and

(5) the Rehabilitation Council of Texas [~~State Rehabilitation Council, if the state has a council~~].

(b) The state plan must specifically describe the manner in which the Division [~~state unit~~] will take into account the views regarding state policy and administration of the state plan that are expressed in the consumer satisfaction surveys conducted by the [~~State~~] Rehabilitation Council of Texas under 34 CFR §361.17(h)(4) [~~(3)~~] or by the [~~state agency if it is in an independent~~] Division [~~in accordance with the requirements of 34 CFR §361.16(a)(1)~~].

§107.139. Definitions.

Words and terms are used in this chapter as defined in the Rehabilitation Act of 1973, as amended, and implemented by 34 Code of Federal Regulations and the Human Resources Code, Title 7, unless the context clearly indicates another meaning. Words and terms defined in such federal and state laws and regulations are applicable to this chapter. In addition, the following definitions apply:

(1) Applicant--An individual who applies to the Division for Rehabilitation [~~Department of Assistive and Rehabilitative~~] Services for vocational rehabilitation services, comprehensive rehabilitation services, or independent living services.

(2) Consumer--An individual with a disability who is determined eligible by the Division for Rehabilitation [~~Department of Assistive and Rehabilitative~~] Services for vocational rehabilitation services, comprehensive rehabilitation services, independent living services, or other Division [~~department~~] services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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40 TAC §107.103

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.103. Organization for Vocational Rehabilitation Services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 3. COMPARABLE BENEFITS

40 TAC §107.173

The amendment is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.173. Availability of Comparable Services and Benefits.

The Division determines whether comparable services or benefits are available under any other program or law to the consumer to meet, in whole or in part, the cost of any VR services. [~~The Division shall use all available comparable services or benefits to meet, in whole or in part, the cost of vocational rehabilitation services.~~] The Division will not make this determination in cases where:

(1) - (3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 4. ELIGIBILITY AND INELIGIBILITY

40 TAC §§107.191, 107.195, 107.197, 107.199

The amendments and new section are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.191. Basic Requirements for Eligibility.

(a) (No change.)

(b) The Division must:

(1) (No change.)

(2) determine that the impairment constitutes or results in a substantial impediment to employment for the applicant;

(3) (No change.)

(4) presume that the applicant is capable of achieving an employment outcome, unless there is a demonstration by clear and convincing evidence [~~in extended evaluation~~] that the applicant is incapable of achieving an employment outcome due to the severity of the individual's disability.

(c) Social Security disability recipients and beneficiaries are presumed eligible for VR services, unless there is a demonstration by clear and convincing evidence that the applicant is incapable of achieving an employment outcome due to the severity of the individual's disability.

§107.195. Ineligibility.

An applicant for rehabilitation services may be determined ineligible when: [~~An individual becomes ineligible for vocational rehabilitation services when the provision of such programmed services would be ineffective in achieving their purpose of employability.~~]

(1) the individual does not have a physical or mental impairment;

(2) the impairment does not constitute or result in a substantial impediment to employment;

(3) VR services are not required for the individual to prepare for, enter, engage in, or retain gainful employment consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice; or

(4) it is demonstrated, by clear and convincing evidence in extended evaluation, that the individual is not capable of achieving an employment outcome due to the severity of the individual's disability.

§107.197. Determination of Ineligibility.

When an applicant is determined ineligible for vocational rehabilitation services or an individual receiving services under an IPE is no longer eligible for services, the Division shall:

(1) - (2) (No change.)

(3) provide the individual with a description of services available from a Client Assistance Program established under 34 CFR Part 370 and information on how to contact that program; [~~and~~]

(4) refer the individual to:

(A) other programs that are part of the One-Stop service delivery system under the Workforce Investment Act that can address the individual's training or employment-related needs; or

(B) local extended employment providers if the ineligibility determination is based on a finding that the individual is incapable of achieving an employment outcome; and

(5) [~~(4)~~] review within 12 months and annually thereafter, if requested by the individual or, if appropriate, by the individual's representative any ineligibility determination that is based on a finding that the individual is incapable of achieving an employment outcome. This review need not be conducted in situations where the individual has refused it, the individual is no longer present in the state, the individual's whereabouts are unknown, or the individual's medical condition is rapidly progressive.

§107.199. Case Closure.

(a) The Division shall close a case when the person's rehabilitation plan has been completed and the person has been determined to have achieved and maintained continuous employment commensurate with the established employment goal for a minimum of 90 days or sooner if:

(1) the Division is unable to locate or contact the person;

(2) the person's disability is so severely limiting that there is little chance the person can be vocationally rehabilitated or the person's medical condition is expected to progress to such a severely limiting degree in a fairly short period of time that rehabilitation services will be of little or no help;

(3) the person has refused services or further services;

(4) the person has died;

(5) the person has been institutionalized;

(6) the person has been determined to have no disabling condition;

(7) the person has refused to cooperate with the Division;

(8) transportation is not feasible or available;

(9) the person has been determined to have no impediment to employment;

(10) Extended Services for supported employment are not available;

(11) the person has chosen Extended Employment (e.g., sheltered workshop); or

(12) the person's case has been transferred to another agency.

(b) Case closure is made with the full knowledge of the person when the person is available.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 5. METHODS OF ADMINISTRATION OF VOCATIONAL REHABILITATION

40 TAC §§107.215, 107.219, 107.221, 107.223, 107.225

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.215. Statewide Studies and Program Evaluation.

(a) (No change.)

(b) Such studies are directed toward:

(1) assessing [~~of~~] the rehabilitation needs of individuals with significant disabilities who reside in the state;

(2) - (5) (No change.)

§107.219. Order of Selection.

(a) In determining whether to invoke an order of selection, the Assistant Commissioner for Rehabilitation Services shall apply the criteria set out in 29 U.S.C. §709 and in 34 C.F.R. §361.36 as amended and in the State Plan. [~~An order of selection established for allocation of vocational rehabilitation services when such services cannot be provided to all who apply and are eligible is as follows:~~]

[~~(1) First priority: Eligible individuals with the most significant disabilities. Such individuals are those with significant disabilities who have serious limitations in three or more functional capacities (mobility, self-care, self-direction, work skills, work tolerance, interpersonal skills, and communication) in terms of an employment outcome.~~]

[~~(2) Secondary priority: Eligible individuals with significant disabilities who have serious limitations in two functional capacities in terms of an employment outcome.~~]

[~~(3) Third priority: Eligible individuals with significant disabilities who have serious limitations in one functional capacity in terms of an employment outcome.~~]

[~~(4) Fourth priority: All other eligible individuals.~~]

(b) The order of selection, if invoked, is applied after eligibility for services is determined.

§107.221. Periodic Reevaluation of Extended Employment.

[~~(a)~~] In accordance with 34 C.F.R. 361.55, the [~~The~~] Division reviews and reevaluates annually, for two years after the individual's case is closed, and thereafter if requested, the status of each individual who has chosen employment in a non-integrated setting. [~~This review or reevaluation must include input from the individual or in an appropriate case, the individual's representative to determine the interests, priorities, and needs of the individual for competitive employment in an integrated setting in the labor market.~~]

[~~(b) The Division makes maximum effort, including the identification of vocational rehabilitation services, reasonable accommodations, and other support services, to enable the eligible individual to benefit from training in, or to be placed in employment in, an integrated setting.~~]

[~~(c) The Division provides services designed to promote movement from extended employment to integrated employment, including supported employment, independent living, and community participation.~~]

§107.223. Individuals Determined to have Achieved an Employment Outcome [~~be Rehabilitated~~].

(a) The Division determines a consumer to have achieved an employment outcome [~~be rehabilitated~~] when the following requirements are met:

(1) (No change.)

(2) the individual has achieved the employment outcome that is described in the individual's IPE and that is consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice; and

(3) - (5) (No change.)

(b) After a consumer has been determined to have achieved an employment outcome [~~be rehabilitated~~], the Division may provide postemployment services as required to maintain, [~~or~~] regain or advance in [~~suitable~~] employment.

§107.225. Training and Supervision of Counselors.

The Assistant Commissioner for Rehabilitation Services is accountable for the monitoring and oversight of Vocational Rehabilitation Counselor performance and decision making in the following areas listed in paragraphs (1) - (5) of this section:

(1) - (3) (No change.)

(4) the measurement of consumer progress toward the employment goal [~~vocational objective~~], including the documented, periodic evaluation of the consumer's rehabilitation and participation; and

(5) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. INDEPENDENT LIVING SERVICES PROGRAM

40 TAC §§107.801, 107.803, 107.805 - 107.807, 107.809, 107.811

The amendments and new section are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government

Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.801. Purpose.

(a) The purpose of the Independent Living Services (ILS) Program is to provide rehabilitation services to individuals with significant disabilities whose ability to function independently in the home, family or community is substantially limited and for whom the delivery of independent living services will substantially improve the ability to function, continue functioning, or move towards functioning independently in the home, family or community [~~when they are necessary to achieve a greater level of self-care and independent living~~].

(b) The Independent Living Services Program is a joint state-federal program. All federal laws, [~~and~~] regulations and conditions required by the acceptance of these funds by the state are applicable to these rules.

§107.803. [~~Basic Requirements for~~] Eligibility.

(a) An individual with a significant disability is eligible for Independent Living Services. [~~meets the basic requirements for eligibility if:~~]

[~~(1) the individual has a significant physical, mental, cognitive or sensory disability that interferes with the ability to remain or become independent in the family, home or community; and~~]

[~~(2) independent living services are needed to improve the individual's ability to be independent, maintain independence, or move towards independence in the family, home or community by decreasing the amount of assistance and/or supervision needed to perform daily activities.~~]

(b) An individual with a significant disability is a person:

(1) who has a severe physical, mental, cognitive, or sensory impairment that substantially limits the individual's ability to function independently in the home, family, or community; and

(2) for whom the delivery of IL services will improve the ability to function, continue functioning, or move toward functioning independently in the home, family, or community.

§107.805. Review of Ineligibility Determination.

(a) If an applicant for IL services has been found ineligible, the Independent Living Services (ILS) counselor will review the applicant's ineligibility at least once within 12 months after the ineligibility determination has been made and whenever the ILS counselor determines that the applicant's status has materially changed. [~~An individual becomes ineligible for independent living services when there is no presence of a significant disability and/or independent living services are not required to be independent, maintain independence or move towards independence in the home, family or community.~~]

(b) The review need not be conducted in situations where the applicant has refused the review, the applicant is no longer present in the state, or the applicant's whereabouts are unknown.

§107.806. Independent Living Plan.

Unless the eligible individual signs a waiver stating that it is unnecessary, an Independent Living plan will be developed indicating the goals or objectives established, the services to be provided, and the anticipated duration of the service program. The IL plan must be developed jointly and signed by the Independent Living Services (ILS) counselor and the individual or the individual's representative. The IL plan must be reviewed as often as necessary but at least on an annual basis to determine whether services should be continued, modified, or discontinued.

§107.807. Services Provided.

Independent [~~The provisions of independent~~] living services may include:

(1) - (16) (No change.)

(17) interpreter services; [~~and~~]

(18) modification of vehicles and residences; and [~~.~~]

(19) other services that are not listed in paragraphs (1) - (18) of this section but that may be necessary to improve the ability of the consumer to function, continue functioning, or move toward functioning independently.

§107.809. Availability of Services.

(a) As case service funds become available, each Independent Living Services (ILS) counselor provides services to consumers whose plan or Waiver has been signed and who are ready for services, in order of their initial contact date. [~~Independent living services are provided on a first come first served basis. When the Commissioner deems necessary, expenditures of IL funds may be authorized for persons outside the stated service areas.~~]

(b) When case service funds are not available, each ILS counselor maintains an Interest and Waiting List of consumers for whom services have not yet been purchased.

(1) The Interest portion of this list consists of:

(A) consumers requesting IL services for whom a plan or waiver has not yet been signed; and

(B) consumers for whom a plan or waiver has been signed, but who are not ready to receive purchased services.

(2) The Waiting portion of this list consists of consumers for whom a plan or waiver has been signed and who are ready to receive purchased services. When funds become available, these consumers are served in order of their initial contact date.

(c) When necessary to avoid inequities, the Assistant Commissioner may transfer case service funds between service areas or counselors and may authorize DARS staff to serve consumers on a waiting list with services from a different counselor.

§107.811. Consumer Participation.

(a) (No change.)

(b) All services are subject to required consumer participation except for the following:

(1) assessment for determining eligibility;

(2) assessment for determining independent living needs, including associated maintenance and transportation;

(3) counseling, guidance, and referral provided by DARS staff;

(4) personal assistance services; and

(5) any auxiliary aid or service (e.g., interpreter services) that a consumer with a disability requires in order to achieve IL goals.

[~~(1) services paid for, or reimbursed by, a source other than the Division;~~]

[~~(2) counseling, guidance, and referral provided by DARS staff;~~]

[(3) assessment services, to determine eligibility and determining independent living needs, including any associated maintenance and transportation;]

[(4) interpreter services;]

[(5) reader services; and/or]

[(6) translator services.]

[(c) Reference: §107.151 of this title (relating to Basic Living Requirements (BLR)).]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802962
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 424-4050

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SUBCHAPTER L. COMPREHENSIVE REHABILITATION SERVICES

40 TAC §107.1201, §107.1207

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.1201. Purpose.

(a) (No change.)

(b) Funding for this program is provided by the comprehensive rehabilitation fund, as authorized by the 72nd Legislature of the State of Texas and by general revenue.

§107.1207. Services Provided.

(a) Inpatient hospitalization at a comprehensive rehabilitation facility. Services may include:

(1) - (2) (No change.)

(3) physical therapy, occupational therapy, and speech-language therapy [pathology];

(4) - (6) (No change.)

(7) orthotic [orthotics] and prosthetic devices [prosthetics];

(8) - (16) (No change.)

(b) Outpatient services. Services may include:

(1) - (2) (No change.)

(3) speech-language therapy [pathology];

(4) - (11) (No change.)

(c) Post-acute services (residential or nonresidential--limited to individuals with traumatic brain injury). Services may include:

(1) - (4) (No change.)

(5) physical therapy, occupational therapy, and speech-language therapy [traditional therapies];

(6) - (8) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
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SUBCHAPTER N. MEMORANDA OF UNDERSTANDING WITH OTHER STATE AGENCIES

40 TAC §107.1601

The amendment is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.1601. Memorandum of Understanding Regarding Continuity of Care for Physically Disabled Inmates.

(a) The Texas Department of Assistive and Rehabilitative Services (department) adopts by reference a memorandum of understanding (MOU) between the Texas Department of Criminal Justice, Department of Aging and Disability Services, and Department of State Health Services. The MOU contains the agreement required by Texas Health and Safety Code §§614.014 - 614.015 to establish the respective responsibilities of these agencies to institute a continuity of care and service program for offenders in the criminal justice system who are physically disabled, terminally ill, or significantly ill.

(b) The MOU is adopted by rule in 37 TAC §159.19 (relating to Continuity of Care and Service Program for Offenders with Physical Disabilities, the Elderly, the Significantly or Terminally Ill and the Mentally Retarded).

(c) The effective date of the MOU, with respect to the department is the same as the effective date of this section.

[(a) Basis. This memorandum of understanding is entered into between the Texas Department of Corrections (TDC), Texas Rehabilitation Commission (TRC), Texas Commission for the Blind (TCB), Texas Commission for the Deaf (TCD), Texas Department of Human Services (TDHS), and Texas Board of Pardons and Paroles (TBP&P) to comply with Senate Bill 245, 70th Legislature, 1987.]

[(b) Understanding. The TDC, TRC, TCB, TDHS, and TBP&P understand and agree that the establishment of each agency's respective responsibilities to the continuity of care for releasing physically handicapped inmates is imperative to their well being. It is further understood that the TDC remains the primary responsible

party, under this memorandum of understanding, up to and until the release of the identified inmate for purposes of this memorandum of understanding. Other services may be provided by agreement of the respective agencies by way of interagency cooperation contracts. Other agencies, as cited, assume only those responsibilities given that agency under its enabling legislation, and only upon the release of the identified inmate.]

[(c) Methods. This memorandum of understanding will establish methods for accomplishing four tasks, basic to the continuity of care of physically handicapped inmates, as set forth in Senate Bill 245, 70th Legislature, 1987.]

[(1) The TDC will identify all physically handicapped inmates as defined below through a comprehensive review of health related conditions upon admission to the TDC and periodically during their confinement in accordance with the Comprehensive Health Care Plan, Health Services Policies and Procedures Numbers 3-8, 3-10, 3-11, 3-36, 3-44, and 3-45, and the National Commission of Correctional Health Care Standards page 30 and page 32. The definition of physically handicapped shall be that as defined in the Physically Handicapped Offender Plan, pursuant to Ruiz v. Lynaugh, and the Health Services Policies and Procedures, Numbers 3-44 and 3-45.]

[(2) The TDC will also identify inmates in need of chronic and convalescent care whose physical conditions impair their abilities to perform daily living activities. The identification will occur through a comprehensive review of health related conditions upon admission to TDC and periodically during their confinement in accordance with the Comprehensive Health Care Plan, Health Services Policies and Procedures Numbers 3-8, 3-10, 3-11, 3-36, 3-44, 3-45, and the National Commission of Correctional Health Care Standards pages 30 and 32.]

[(3) The TDC will review admission records, together with the periodic health reviews, and all medical treatment records prior to release. Where possible, this will be accomplished no sooner than 60 days prior to, but no later than 30 days prior to, the designated release date of the identified inmate. A comprehensive listing of functional limitations, including the origin of such limitations, will be developed and made available to the appropriate receiving agency, based upon that agency's currently published guidelines for referral.]

[(4) To avoid duplication of efforts, only pertinent portions of the medical records as defined by the receiving agency, and other information relating to the well-being of the inmate will accompany the resulting referral to the receiving agency. Upon approval and signing of this memorandum of understanding, the TBP&P may act as the central distribution point for referral to the appropriate agency.]

[(5) Agencies determined by the TBP&P and TDC to be the appropriate receiving agency will be notified of the pending release date and destination. Where possible, this will be accomplished no later than 30 days prior to release. The receiving agency may contact the inmate prior to release to coordinate delivery of services whenever feasible.]

[(6) All applicable standards for program accessibility by physically disabled individuals will be adhered to by the signature agencies of this memorandum of understanding.]

[(7) The receiving agency shall provide the referring agency with a response to the initial referral which details the action taken and the contact person involved.]

[(d) Responsibility. No agency who, by signing this memorandum of understanding participates in the efforts to assure continuity of care of releasing inmates, shall bear any responsibility other than that given them by their enabling legislation.]

[(e) Basis for referral.]

[(1) TDHS. The TDHS will accept referrals on persons who are at least 18 years of age or emancipated minors and financially eligible for services. There is no age requirement for primary home care, day activity and health services, and residential health care. The persons must also have sufficient need for assistance with daily living activities and a medical need and physician's orders for primary home care, day activity and health services, or residential health care. Other community services that are offered to help persons remain in their own homes and communities include family care, home-delivered or congregate meals, emergency care, emergency response systems, adult foster care, residential care, and special services to the handicapped. The TDHS will also accept referrals for any other services TDHS provides.]

[(2) TCD. The TCD provides services to persons who are deaf or hearing-impaired. Direct services, including interpreter services, information and referral services, services to the elderly, and message relay services, are provided by the nonprofit, community-based organizations called councils for the deaf. Currently, there are 16 councils located in 15 cities: Amarillo, Lubbock, Big Spring, El Paso, Corpus Christi, San Antonio, Abilene, Fort Worth, Austin, Houston (two), Sherman, Waco, Dallas, Tyler, and Beaumont.]

[(3) TCB. The TCB will accept referrals on individuals who have been diagnosed as having at least a visual acuity of 20%6170 best correction in both eyes, or worse. Individuals meeting this criteria may be referred to be considered for vocational rehabilitation, which may include employment assistance; job readiness, counseling, and guidance; independent living; and older blind services.]

[(4) TRC. The TRC will accept referrals on persons who have a physical or mental condition which significantly interferes with their ability to work. A broad range of services are available. Each individual is carefully assessed and services provided to eligible persons based on their needs. Services may include diagnostics, transportation, physical restoration, training, tools and equipment, job placement, and counseling.]

[(f) Adoption by rule. The departments, boards, and commissions by rule shall adopt this memorandum of understanding.]

[(g) Effective date. This memorandum of understanding is effective December 31, 1987.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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40 TAC §§107.1607, 107.1609, 107.1613

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provide the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.1607. Coordinated Services for Children and Youths.

§107.1609. Elimination of Unnecessary or Duplicative Program Reviews of Community Mental Health of Mental Retardation Centers.

§107.1613. Memorandum of Understanding on Individual Transition Planning for Students Receiving Special Education Services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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CHAPTER 108. DIVISION FOR EARLY CHILDHOOD INTERVENTION SERVICES

(Editor's note: The Texas Register has excluded from this issue proposed rulemaking documents for Title 40, Chapter 101, Subchapter E, relating to Appeals and Hearing Procedures, because the numbering scheme conflicted with existing sections of the 40 TAC Chapter 101; therefore, references to those rules in the Department of Assistive and Rehabilitative Services' other rulemaking documents may not be accurate.)

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), proposes to amend the DARS rules in Title 40, Part 2, Chapter 108, Division for Early Childhood Intervention Services. This proposal amends Subchapter A, Early Childhood Intervention Service Delivery, §§108.23, 108.29, and 108.47. This proposal also repeals §108.63 and §108.67 of Subchapter B, Procedural Safeguards and Due Process Procedures.

The proposed amendments clarify the definitions of "Family Educational Rights and Privacy Act of 1974 (FERPA)", "Provider", and "Supplanting" in §108.23; the meanings of "program income" and "maintenance of effort" in §108.29; and the standards of conduct in the Early Intervention Specialist code of ethics in §108.47. These amendments are for the purpose of more clearly complying with other controlling federal laws and state statutes. The content of the repeal of §108.63 is being transferred to Chapter 101, Subchapter E, Division 3, as new §101.1011 which is contemporaneously proposed elsewhere in this issue of the *Texas Register.* Section 108.67, "Charges for Access to Public Records" is being repealed because the procedures are either required by statute (Texas Government Code Chapter 552), by rules of the Attorney General, or are published by DARS in compliance with those statutes and rules.

In accordance with the requirements of Texas Government Code §2001.039, DARS has conducted a four-year review of Title 40, Part 2, Chapter 108, of the DARS rules. Chapter 108 consists of Subchapter A, Early Childhood Intervention Service Delivery, §§108.21, 108.23, 108.25, 108.27, 108.29, 108.31, 108.33, 108.35, 108.37, 108.39, 108.43, 108.47, and 108.48; Subchapter B, Procedural Safeguards and Due Process Procedures, §§108.55, 108.57, 108.59, 108.61, 108.63, and 108.67; Subchapter D, General Provisions for Case Management Services for Infants and Toddlers with Developmental Disabilities, §§108.221, 108.223, 108.225, 108.227, 108.229, 108.231, 108.233, and 108.235; Subchapter E, Developmental Rehabilitation Services, §§108.261, 108.263, and 108.265; and Subchapter F, System of Fees, §§108.291, 108.293, and 108.295. DARS has determined that the reasons for initially adopting these rules continue to exist except for Subchapter B, §108.63, and §108.67 because of the reasons stated above. Notice of the proposed rule review of Chapter 108 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8864).

The proposal is authorized by the Texas Human Resources Code, Chapter 73; and The Individuals with Disabilities Education Act, as amended, 20 U.S.C. §1400 et seq. and its implementing regulations; 34 C.F.R. Part 303, as amended.

Bill Wheeler, DARS Chief Financial Officer, estimates that for each year of the first five years that the proposal is in effect, there will be no material fiscal implications for state or local government.

Mr. Wheeler also estimates that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of adopting the rules will be the agency's compliance with House Bill 2292, 78th Legislature, Regular Session, and other existing provisions of law pertaining to provision of health and human services in Texas.

Mr. Wheeler has also determined there should be no material economic cost to persons who are required to comply with the proposal. Further, in accordance with Texas Government Code §2001.022, he has determined that the proposal will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Mr. Wheeler has determined that the proposal will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposal may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756.

SUBCHAPTER A. EARLY CHILDHOOD INTERVENTION SERVICE DELIVERY

40 TAC §§108.23, 108.29, 108.47

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.23. Definitions.

The following words and terms, when used in this chapter, will have the following meanings, unless the context clearly indicates otherwise.

(1) - (14) (No change.)

(15) Family Educational Rights and Privacy Act of 1974 (FERPA)--20 U.S.C. Section 1232g, as amended, and implementing regulations at [~~;~~] 34 CFR Part 99 - Federal law that outlines privacy protection for parents and children enrolled in the ECI program. FERPA includes rights to confidentiality and restrictions on disclosure of personally identifiable information, and the right to inspect records.

(16) - (27) (No change.)

(28) Provider [~~Provide~~]--A local private or public agency with proper legal status and governed by a board of directors or governing authority that accepts funds from the Department to administer the Early Childhood Intervention (ECI) Program.

(29) - (34) (No change.)

(35) Supplanting--The withdrawal or withholding of local, private, or other public funds for services which were or are available for services to children and expenditure of federal ECI funds instead [~~during the previous year of funding~~]. See 34 CFR §303.124 and 34 CFR Part 81 - Appendix.

(36) - (38) (No change.)

§108.29. Application and Program Requirements for Comprehensive Services.

(a) - (c) (No change.)

(d) Program income.

(1) Program income is defined in UGMS, and the use of it is limited by UGMS. DARS interprets UGMS requirements, to the extent that it has authority to do so, as all revenue directly generated by ECI contract-supported activities or earned only as a result of the ECI contract. It includes, but is not limited to, Medicaid Targeted Case Management (TCM), Medicaid Texas Health Steps/Comprehensive Care Program (THSteps/CCP), Medicaid Administrative Claiming (MAC), Children's Health Insurance Program (CHIP), Children with Special Health Care Needs (CSHCN) funds, and private insurance, and family cost share revenue.

(2) - (6) (No change.)

(e) Maintenance of Effort

(1) Maintenance of effort (MOE) represents the total funds and in-kind contributions available for support of the ECI program from sources other than the ECI contract. Reporting of MOE requires that all operating expenses, revenue sources, and in-kind contributions be reported to provide a clear and comprehensive valuation of the ECI program.

(2) The ECI provider's MOE may include, if applicable and allowable, the following:

(A) Federal funds, only if those funds do not fall within the prohibitions in 34 CFR §300.203, or[~~,~~] state or[~~, and~~] local funds;

(B) - (D) (No change.)

(3) - (9) (No change.)

(f) - (g) (No change.)

§108.47. Early Intervention Specialist Code of Ethics.

An Early Intervention Specialist (EIS) must observe and comply with the following standards of conduct in the EIS code of ethics.

(1) - (12) (No change.)

(13) EISs must not refuse to provide services for which they are credentialed [~~solely~~] on the basis of a child's and/or family's gender, race, [~~socioeconomic status,~~] ethnicity, color, religion, national origin, [~~disability,~~] sexual orientation, or political affiliation, and they must not refuse to provide services for which they are credentialed solely on the basis of a child's or family's socioeconomic status or disability.

(14) - (15) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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SUBCHAPTER B. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

40 TAC §108.63, §108.67

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.63. Administrative Hearings Concerning Individual Child Rights.

§108.67. Charges for Access to Public Records.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
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Department of Assistive and Rehabilitative Services
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CHAPTER 109. OFFICE FOR DEAF AND HARD OF HEARING SERVICES

(Editor's note: The Texas Register has excluded from this issue proposed rulemaking documents for Title 40, Chapter 101, Subchapter E, relating to Appeals and Hearing Procedures, because the numbering

scheme conflicted with existing sections of the 40 TAC Chapter 101; therefore, references to those rules in the Department of Assistive and Rehabilitative Services' other rulemaking documents may not be accurate.)

The Texas Health and Human Services Commission ("HHSC"), on behalf of the Texas Department of Assistive and Rehabilitative Services ("DARS"), proposes new rules, amendments, and repeals to the rules of the Texas Department of Assistive and Rehabilitative Services, Title 40, Part 2, Chapter 109, Office for Deaf and Hard of Hearing Services.

Specifically, DARS is proposing the following new rules, amendments, and repeals with respect to Chapter 109:

Subchapter A, General Rules: an amendment to §109.101, Definitions; and new §109.105, Training Fees, Gifts, Grants, or Donations, and §109.107, Trilingual Interpreter Services;

Subchapter B, Board for Evaluation of Interpreters and Interpreter Certification: deletion of the designation of a "Division 1" and its title "Definitions and Board Operations", as there are no other divisions listed under Subchapter B; the repeal of §109.201, Definitions, §109.209, Fees for Interpreter Training, §109.211, Trilingual Interpreter Services, §109.241, Revocation or Suspension of Certificate, §109.243, Grounds for Denying, Suspending, or Revoking an Interpreter's Certificate, and §109.245, Code of Professional Conduct; amendments to §109.203, Obtaining Documents and Information from the Office, §109.205, Registry of Qualified Interpreters, §109.223, Provisional Certificate, §109.231, Validity of Certificates and Recertification, §109.233, Certificate Renewal, 109.235, Continuing Education Programs; and new §109.227, Certification, §109.229, Administration of Examination for Court Interpreter Certification and §109.237, Disciplinary Actions;

Subchapter C, Certified Court Interpreters: the repeal of §109.301, Definitions, §109.313, Lists of Qualified Court Interpreters and Providers of Communication Access Realtime Translation Services, §109.315, Gifts, Grants, or Donations, §109.321, Certification, §109.327, Administration of Examinations, §109.329, Form for Certificates, §109.331, Procedures for Renewal of a Certificate, §109.333, Fees for Training, Examinations, Initial Certification and Certification Renewal, §109.335, Continuing Education Programs Required for Court Interpreter Initial Certification or Certification Renewal, §109.341, Code of Professional Conduct, §109.351, Denial, Suspension, or Revocation of Certificate, and §109.353, Disciplinary Actions; amendments to §109.303, Requirements for Interpreting Court Proceedings in Courts of the State of Texas, §109.311, Obtaining Documents and Information from the Office, §109.323, Qualifications of Certified Court Interpreters, §109.325, Training Programs for Certified Court Interpreters Managed by the Department or by Public or Private Educational Institutions, §109.337, Instructions for the Compensation of a Certified Court Interpreter and Designation of the Party or Entity Responsible for Payment of Compensation, §109.339, Administrative Sanctions Enforceable by the Department, §109.361, Prohibited Acts, §109.363, Enforcement, §109.365, Criminal Offense, §109.367, Actions Against Persons Not Certified as Court Interpreters, §109.371, Court Interpreter Qualifications in Civil Cases or Depositions Pursuant to the Civil Practice and Remedies Code and §109.373, Court Interpreter Qualifications in Criminal Actions Pursuant to Code of Criminal Procedure; and the title of Subchapter C is amended to "Certified Court Interpreters General Rules";

Subchapter D, Specialized Telecommunications Assistance Program: amendments to §109.403, Statutory Authority, §109.405, Definitions, §109.407, Determination of Basic Equipment or Service, §109.411, Entities Authorized to Certify Disability, and §109.415, Determination of Voucher Value.

These new rules, amendments, and repeals are being proposed pursuant to Human Resources Code, Chapter 81; Texas Government Code, Chapter 57; Code of Criminal Procedure, Article 38; Civil Practices and Remedies Code, Chapter 21; and pursuant to DARS' four-year rule review of Chapter 109, which DARS conducted as required by Texas Government Code §2001.039. As a result of the review, DARS determined that the reasons for originally adopting the rules continue to exist. However, the review identified areas where new rules, amendments, and repeals were needed to strengthen and clarify rules relating to DARS' Office for Deaf and Hard of Hearing Services and the services and programs which it administers on behalf of deaf and hard of hearing consumers, especially rules relating to DARS' interpreter certification programs. Notice of the proposed rule review of Chapter 109 was published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8864).

Note the substantive content of repealed §§109.201, 109.209, and 109.211, is being transferred and proposed contemporaneously elsewhere in this issue of the *Texas Register* in §109.101, Definitions, and new §109.105, Training Fees, Gifts, Grants, or Donations, and §109.107, Trilingual Interpreter Services, respectively, of Chapter 109, Subchapter A; and the substantive content of repealed §§109.241, 109.243, and 109.245, is being transferred and proposed contemporaneously elsewhere in this issue of the *Texas Register* as new §101.1107, Revocation and Suspension of a Certificate, §101.1109, Grounds for Denying, Revoking, or Suspending an Interpreter's Certificate, and §101.1111, Codes of Professional Conduct and Ethics, respectively, of Title 40, Part 2, Chapter 101, Administrative Rules and Procedures, Subchapter E, Appeals and Hearings Procedures, Division 4, Office for Deaf and Hard of Hearing Services.

Note that the substantive content of §§109.321, 109.327, and 109.353, of Subchapter C, is being transferred and proposed contemporaneously elsewhere in this issue of the *Texas Register* in new §109.227, Certification, §109.229, Administration of Examination for Court Interpreter Certification, and §109.237, Disciplinary Actions, respectively, of Chapter 109, Subchapter B. Also note that the substantive content of repealed §109.341 and §109.351, of Subchapter C, is being transferred and proposed contemporaneously elsewhere in this issue of the *Texas Register* as new §101.1111, Codes of Professional Conduct and Ethics, and §101.1109, Grounds for Denying, Revoking, or Suspending an Interpreter's Certificate, respectively, of Title 40, Part 2, Chapter 101, Administrative Rules and Procedures, Subchapter E, Appeals and Hearings Procedures, Division 4, Office for Deaf and Hard of Hearing Services.

Bill Wheeler, Chief Financial Officer, Texas Department of Assistive and Rehabilitative Services, estimates that for each year of the first five years that the proposal is in effect, there will be no foreseeable fiscal implications for state or local governments costs or revenues as a result of enforcing or administering the proposal.

Mr. Wheeler has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal will be stronger and clearer rules relating to services for the deaf and hard of hearing community and assurances to the public that the necessary rules are

in place to provide services to the deaf and hard of hearing community so that it is able to fully integrate into and participate as part of society at large and receives equal access to community programs and services. Mr. Wheeler also has determined that there will be no probable economic cost to persons who are required to comply with the proposal.

Furthermore, in accordance with Texas Government Code §2001.022, Mr. Wheeler has determined that the proposal will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Mr. Wheeler has determined that the proposal will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposal may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756.

SUBCHAPTER A. GENERAL RULES

40 TAC §§109.101, 109.105, 109.107

The amendments and new sections are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§109.101. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise: [~~DHHS or Office--Office for Deaf and Hard of Hearing Services, Division for Rehabilitation Services, Department of Assistive and Rehabilitative Services.~~]

(1) BEI--Board for Evaluation of Interpreters, Office for Deaf and Hard of Hearing Services, Division for Rehabilitation Services, Department of Assistive and Rehabilitative Services.

(2) Certified court interpreter--an individual who is a qualified interpreter as defined in Article 38.31, Code of Criminal Procedure, or §21.003, Civil Practice and Remedies Code, or certified under Subchapter B of this chapter by the Department of Assistive and Rehabilitative Services to interpret court proceedings for a hearing-impaired individual.

(3) Commissioner--Commissioner of the Department of Assistive and Rehabilitative Services.

(4) Court proceeding--a proceeding that is under the jurisdiction of Texas state courts for civil cases and criminal actions, including, but not limited to, arraignments, hearings, examining trials, trials, depositions, mediations, court-ordered arbitrations, or other forms of alternative dispute resolution.

(5) DARS Inquiries Unit--toll-free, 1-800-628-5115 (V) or 1-866-581-9328 (TTY).

(6) Department--the Department of Assistive and Rehabilitative Services (DARS).

(7) DHHS or Office--Office for Deaf and Hard of Hearing Services, Division for Rehabilitation Services, Department of Assistive and Rehabilitative Services, 4900 North Lamar Boulevard, Austin, Texas 78751, 512-407-3250 (V) or 512-407-3251 (TTY).

(8) Director--Director of the Office for Deaf and Hard of Hearing Services.

(9) Hearing-impaired individual --an individual who has a hearing impairment, regardless of whether the individual also has a speech impairment that inhibits the individual's comprehension of proceedings or communication with others.

(10) Qualified interpreter--an individual who holds a current interpreter certificate issued by the BEI or a current certificate issued by the Registry of Interpreters for the Deaf, Inc. (RID). This definition does not apply to an individual who is required to hold a court interpreter certification from BEI or a legal certification from RID to interpret court proceedings.

(11) RID--Registry of Interpreters for the Deaf, Inc.

(12) Trilingual interpreter services--the provision of interpreting services by an otherwise qualified interpreter who is proficient in a third language, in addition to English and sign language.

§109.105. Training Fees, Gifts, Grants, or Donations.

(a) The department may establish and collect training fees and accept gifts, grants, and donations of money, personal property, or real property for use in expanding and improving services to persons of this state who are deaf or hard of hearing.

(b) The department may accept gifts, grants, or donations from private individuals, foundations, or other entities to assist in administering the court interpreter certification program.

(c) Training fees are set forth in announcements of training opportunities which are issued by the Office.

(d) Authority: Human Resource Code, §81.006(b)(5) and Texas Government Code, §57.022(b)(5) and §57.021(e).

§109.107. Trilingual Interpreter Services.

The Office has developed guidelines for trilingual interpreter services, and provides information about training programs for persons who provide trilingual interpreter services. Copies of the guidelines and information about the training programs may be obtained from the Office. (Authority: Human Resources Code, §81.006(b)(6) - (7).)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802968
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: July 20, 2008
For further information, please call: (512) 424-4050

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SUBCHAPTER B. BOARD FOR EVALUATION OF INTERPRETERS AND INTERPRETER CERTIFICATION

DIVISION 1. DEFINITIONS AND BOARD OPERATIONS

40 TAC §§109.201, 109.209, 109.211, 109.241, 109.243, 109.245

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§109.201. Definitions.

§109.209. Fees for Interpreter Training.

§109.211. Trilingual Interpreter Services.

§109.241. Revocation or Suspension of Certificate.

§109.243. Grounds for Denying, Suspending, or Revoking an Interpreter's Certificate.

§109.245. Code of Professional Conduct.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Department of Assistive and Rehabilitative Services
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SUBCHAPTER B. BOARD FOR EVALUATION OF INTERPRETERS AND INTERPRETER CERTIFICATION

40 TAC §§109.203, 109.205, 109.223, 109.227, 109.229, 109.231, 109.233, 109.235, 109.237

The amendments and new sections are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§109.203. Obtaining Documents and Information from the Office.

Documents and other information identified in these rules as being available from the Office, may be obtained by making a request to the Office [~~for Deaf and Hard of Hearing Services, 4900 North Lamar Blvd, Austin, Texas 78751, 512-407-3250 (V) or 512-407-3251 (TTY), or by calling the DARS Inquiries Unit, toll-free, 1-800-628-5115~~]. (Authority: Human Resources Code, §81.006(b)(3).)

§109.205. Registry of Qualified Interpreters.

(a) The Office maintains a registry of available qualified interpreters for persons who are deaf or hard of hearing. The registry is updated at least quarterly and is available to interested persons at cost. [~~Copies may be obtained from the Office. (Authority: Human Resources Code, §81.006(a)(4).)~~]

(b) The department maintains lists of certified court interpreters and other persons the department has determined are qualified to act as court interpreters.

(c) The lists of certified court interpreters and other persons the department has determined are qualified to act as court interpreters are sent by the Office to each state court.

(d) Copies may be obtained from the Office upon request.

(e) Authority: Human Resources Code, §81.006(a)(4) and Texas Government Code, §57.021(c).

§109.223. Provisional Certificate.

(a) - (c) (No change.)

(d) The Office [~~office~~] must approve or deny a provisional certificate holder's application for a certificate not later than the 180th day after the date the provisional certificate is issued. The Office [~~office~~] may extend the 180-day period if the results of an examination have not been received by the Office [~~office~~] before the end of that period.

(e) The Office [~~office~~] has established a fee for provisional certificates in an amount reasonable and necessary to cover the cost of issuing the certificate. The amount of the current fee for provisional certificates may be obtained from the Office.

(f) Authority: Human Resources Code, §81.0074.

§109.227. Certification.

(a) The department will certify an applicant who passes the appropriate examination prescribed by the department and who possesses the other qualifications required by the rules in this chapter.

(b) Upon successful completion of all requirements for certification and approval by the Office, the applicant shall be issued a card evidencing certification.

(c) Authority: Texas Government Code, §57.022(a) and §57.022(b)(4) and Human Resources Code, §81.007(a).

§109.229. Administration of Examination for Court Interpreter Certification.

(a) General: The provisions of this section shall apply only to applicants for certified court interpreter certification.

(1) In accordance with Texas Government Code, §57.023, the department will prepare court interpreter examinations under this subchapter that test an applicant's knowledge, skill, and efficiency in the field in which the applicant seeks certification.

(2) A person who fails an examination may apply for reexamination at the next examination scheduled after the date the person failed the original examination.

(3) Examinations will be offered in the state at least twice a year at times and places designed by the department. The current schedule of times and places for examinations may be obtained from the Office.

(b) Examination on legal and court procedure skills and knowledge:

(1) A passing grade on the examination is 80 percent.

(2) The examinations will be administered to applicants with content and format determined by the Office.

(3) Subject to the following provisions, an applicant may request an accommodation in accordance with the Americans with Disabilities Act.

(A) The request must be in writing.

(B) Proof of disability and the limiting factors of the disability may be required.

(4) An applicant who does not attend a scheduled examination will forfeit the examination fee. An applicant may attend a future examination without payment of additional fee upon proof of the following:

(A) Illness of the person or an intermediate family member whom the person is required to attend; or

(B) Documented evidence that the applicant was unable to attend the examination due to reasons beyond his or her control.

(5) Certification is effective for a period of 5 years from the date of certification.

(6) Cheating on an examination is grounds for denial, suspension, or revocation of a certification and/or an administrative penalty.

(c) Authority: Texas Government Code, §§57.022(b)(3), 57.023 and 57.027(b).

§109.231. Validity of Certificates and Recertification.

(a) (No change.)

(b) Interpreters may be recertified who receive up to a specified number of continuing education credits, or who achieve an adequate score on a specified examination. Information on current recertification requirements may be obtained from the Office. (Authority: Human Resources Code, §81.007(g).)

§109.233. Certificate Renewal.

(a) - (f) (No change.)

(g) Nonreceipt of a certification renewal notice from the Office does not exempt a person from any requirements of this subchapter.

(h) [~~(g)~~] Authority: Human Resources Code, §81.0073.

§109.235. Continuing Education Programs.

The Office recognizes, prepares, and/or administers continuing education programs for its certificate holders. A certificate holder must participate in the programs to the extent required by the Office [~~office~~] to keep the person's certificate. Current requirements for continuing education, and announcements of current training opportunities, may be obtained from the Office. (Authority: Human Resources Code, §81.007(l), and Texas Government Code §57.022(b)(6).

§109.237. Disciplinary Actions.

(a) The Department or Office may take disciplinary action against a certificate holder who is found to be in violation of a statute, rule, or policy of the Office or Department, including any of the provisions of §101.1109 of this title (relating to Grounds for Denying, Revoking, or Suspending an Interpreter's Certificate).

(b) A disciplinary action may be composed of any one or combination of the following listed in paragraphs (1) - (6) of this subsection:

(1) revocation of a certification;

(2) suspension of a certification;

(3) probation of a suspended certification;

(4) refusal to renew a certification;

(5) issuance of a formal or informal reprimand; or

(6) with respect to certified court interpreters only, assessment of an administrative penalty under the law.

(c) All final disciplinary actions taken by the Department or by the Office shall be permanently recorded and made available upon request as public information. Except for an informal reprimand, all disciplinary actions may be released in a press release, and may be transmitted to the RID, as appropriate.

(d) An interpreter whose certification has expired for nonpayment of renewal fees continues to be subject to all statutory, rule, and procedural provisions of the Department governing certified interpreters until the certification is revoked by the Department or becomes nonrenewable under the law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
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SUBCHAPTER C. CERTIFIED COURT INTERPRETERS

40 TAC §§109.301, 109.313, 109.315, 109.321, 109.327, 109.329, 109.331, 109.333, 109.335, 109.341, 109.351, 109.353

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§109.301. Definitions.

§109.313. Lists of Qualified Court Interpreters and Providers of Communication Access Realtime Translation Services.

§109.315. Gifts, Grants, or Donations.

§109.321. Certification.

§109.327. Administration of Examinations.

§109.329. Form for Certificates.

§109.331. Procedures for Renewal of a Certificate.

§109.333. Fees for Training, Examinations, Initial Certification and Certification Renewal.

§109.335. Continuing Education Programs Required for Court Interpreter Initial Certification or Certification Renewal.

§109.341. Code of Professional Conduct.
§109.351. Denial, Suspension, or Revocation of Certificate.
§109.353. Disciplinary Actions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
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SUBCHAPTER C. CERTIFIED COURT INTERPRETERS GENERAL RULES

40 TAC §§109.303, 109.311, 109.323, 109.325, 109.337, 109.339, 109.361, 109.363, 109.365, 109.367, 109.371, 109.373

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§109.303. Requirements for Interpreting Court Proceedings in Courts of the State of Texas.

(a) (No change.)

(b) A person interpreting court proceedings in Texas courts must hold a current court interpreter [~~legal~~] certificate issued by the BEI [~~Registry of Interpreters for the Deaf~~] or a current legal [~~court interpreter~~] certificate issued by the RID [~~Board for Evaluation of Interpreters of the Department of Assistive and Rehabilitative Services.~~].

(c) Source: Civil Practice and Remedies Code, §21.003; Code of Criminal Procedure, Art. 38.31(g).

(d) Authority: Texas Government Code, [~~§~~]§57.026 and §57.027[~~, 57.027(a), 57.027(b)~~].

§109.311. Obtaining Documents and Information from the Office.

(a) Documents and other information concerning court interpreter certification that are identified as being available from the Office, may be obtained from the Office [~~Department of Assistive and Rehabilitative Services, Office for Deaf and Hard of Hearing Services, 4900 North Lamar Blvd., Austin, Texas 78751-2399, or by calling the DARS Inquiries Unit, toll-free, 1-800-628-5115~~].

(b) (No change.)

§109.323. Qualifications of Certified Court Interpreters.

(a) (No change.)

(b) An individual shall not interpret a court proceeding or deposition unless properly qualified under this subsection as court interpreter for that particular case. In order to be qualified as court interpreter for a particular case, the individual must present to the judge presiding, or to the court reporter at a deposition, either:

(1) a current card issued by the BEI [~~Department of Assistive and Rehabilitative Services, Division for Rehabilitation Services, Board for Evaluation of Interpreters~~], stating that the individual is certified as a court interpreter; or

(2) a current membership card issued in the name of the individual by the RID [~~Registry of Interpreters for the Deaf, Inc., 333 Commerce Street, Alexandria, VA 22314~~], carrying the designations "Certified" and "SC:L."

(c) (No change.)

(d) Training and Qualifications to Take Examination.

(1) (No change.)

(2) The current list of approved courses of instruction in courtroom interpretation skills and training programs for interpreters applying for Court Interpreter Certification or certified court interpreters needing continuing education unit credits may be obtained from the Office [~~Department of Assistive and Rehabilitative Services, Office for Deaf and Hard of Hearing Services, 4900 North Lamar Blvd., Austin, Texas 78751-2399,~~] or by calling the DARS Inquiries Unit, toll-free, 1-800-628-5115.

(e) A person with an expired certification shall not perform work requiring a certification under Chapter 57 of the Texas Government Code.

(f) [~~(e)~~] Authority: Texas Government Code, [~~§~~]§57.022(b)(1)[~~, 57.027(a), 57.027(b)~~].

§109.325. Training Programs for Certified Court Interpreters Managed by the Department or by Public or Private Educational Institutions.

(a) - (b) (No change.)

(c) Authority: Texas Government Code, [~~§~~]§57.021(b) and §[~~,~~] 57.022(b)(2)[~~, 57.027(a), 57.027(b)~~].

§109.337. Instructions for the Compensation of a Certified Court Interpreter and Designation of the Party or Entity Responsible for Payment of Compensation.

(a) In accordance with Civil Practice and Remedies Code, §21.006 and HB 2292, 78th Legislature (RS), §1.21, the court interpreter in civil cases and depositions shall be paid a reasonable fee determined by the court after considering the recommended fees of the Department [~~of Assistive and Rehabilitative Services~~]. If the interpreter is required to travel, the interpreter's actual expenses of travel, lodging, and meals relating to the case shall be paid at the same rate provided for state employees. The interpreter's fee and expenses shall be paid from the general fund of the county in which the case was brought.

(b) In accordance with Code of Criminal Procedure, Article 38.31(f), and HB 2292, 78th Legislature (RS), §1.21, interpreters appointed in criminal actions, to include arraignments, hearings, examining trials, and trials, are entitled to a reasonable fee determined by the court after considering the recommendations of the Department [~~of Assistive and Rehabilitative Services~~]. When travel of the interpreter is involved, all the actual expenses of travel, lodging, and meals incurred by the interpreter pertaining to the case he or she is appointed to serve shall be paid at the same rate applicable to state employees.

(c) Under the authority of the Texas Code of Criminal Procedure Art. 38.31(f), Texas Government Code, §57.022(b)(7), and the Civil Practice and Remedies Code, §21.006, the Department [~~Office~~] establishes recommended fees for the payment of interpreter services for persons who are deaf or hard of hearing which must be provided

in proceedings of state agencies; state, county, and municipal civil and criminal courts; and political subdivisions.

(d) - (g) (No change.)

§109.339. Administrative Sanctions Enforceable by the Department.

(a) If a person violates any provision of Title 2, Texas Government Code, Chapter 57, the provisions of Texas Human Resources Code, Chapter 81 (relating to the Office [~~Texas Commission for the Deaf and Hard of Hearing~~]), any provision of Subchapter B of this chapter, or any provision of an order of the Director or the Office, proceedings may be instituted to impose administrative penalties, administrative sanctions, or both administrative penalties and sanctions in accordance with Texas Human Resources Code, Chapter 81 or Texas Government Code, Chapter 57.

(b) Authority: Texas Government Code, §57.022(b)(8) and [~~,~~] §57.027(b).

§109.361. Prohibited Acts.

(a) A person may not interpret for a hearing-impaired individual at a court proceeding or advertise or represent that the person is a certified court interpreter unless the person holds a current court interpreter [~~legal~~] certificate issued by the BEI [~~Registry of Interpreters for the Deaf~~] or a current legal [~~court interpreter~~] certificate issued by the RID [~~Board for Evaluation of Interpreters of the Department of Assistive and Rehabilitative Services~~].

(b) - (c) (No change.)

§109.363. Enforcement.

(a) The Department or Office [~~commissioner~~] shall investigate allegations of violations, and shall enforce this subchapter. Allegations concerning violations of this subchapter should be forwarded, in writing, to the Director[~~, Office for Deaf and Hard of Hearing Services, 4900 North Lamar Blvd., Austin, Texas 78751~~].

(b) Authority: Texas Government Code, §57.024.

§109.365. Criminal Offense.

(a) Texas Government Code, §57.027(a) provides that a person commits an offense if the person violates Texas Government Code Chapter 57, Subchapter B, pertaining to court interpreters for hearing impaired individuals, or a rule adopted under Texas Government Code Chapter 57, Subchapter B [~~the subchapter~~]. An offense under Texas Government Code, §57.027(a) is a Class A misdemeanor.

(b) The provisions of this subchapter are [~~Sections 109.303, 109.323, 109.325, 109.327, 109.329, 109.331, 109.333, 109.335, 109.337 and 109.361 of this subchapter (relating to Certified Court Interpreters) are~~] adopted under the provision of law described in subsection (a) of this section, and violations are subject to criminal penalties. In addition, violations of the provisions of §109.303 and §109.361 of this subchapter would constitute direct violations of Texas Government Code, §57.026, and would also be subject to criminal penalties under Texas Government Code, §57.027(a).

(c) Authority: Texas Government Code, Chapter 57 [~~§57.027(a)~~].

§109.367. Actions Against Persons Not Certified as Court Interpreters.

(a) The Office shall investigate complaints and may initiate disciplinary [~~take~~] action against a person alleged to perform court interpretation without certification or authorization as provided by this subchapter. The following investigative process and resulting action listed in paragraphs (1) - (3) of this subsection will be followed by the Office to ensure affected individuals are afforded due process of law.

(1) Upon receipt of a formal or staff-initiated complaint, the information will be evaluated to determine if the evidence provides reasonable [~~sufficient probable~~] cause that a violation may have occurred.

(2) If reasonable [~~sufficient probable~~] cause does not exist, an investigation will not be initiated.

(3) If reasonable [~~sufficient probable~~] cause is found, then an investigation will be initiated by the Office staff to determine if a violation of law has occurred. The Office's investigative process will be as follows.

(A) The individual [~~or firm~~] will be advised of the complaint and the specific section of the Act which appears to have been violated. [~~If the initial evidence is sufficiently strong, the Director may offer the respondent a consent order that, if accepted, will be presented to the Office for acceptance or rejection. The consent order shall include an administrative penalty not inconsistent with §109.339 of this title (relating to Administrative Sanctions Enforceable by the Department) and a compliance requirement. The respondent shall be fully informed of the range of penalties allowed under criminal, civil, and administrative proceedings.~~]

(B) The individual [~~respondent~~] will be afforded the opportunity to respond to the complaint to show that the actions which precipitated the complaint are not in violation of the Act [~~, or to accept the consent order~~].

(C) If, after evaluation of the individual's [~~respondent's~~] response, a violation appears evident, the individual [~~respondent~~] will be afforded the opportunity for a hearing as provided to certificate holders under Chapter 101, Subchapter E, Divisions 1 and 4 of this title (relating to General Rules and Office for Deaf and Hard of Hearing Services) or to resolve the complaint through a Department order, which may include the imposition of an administrative penalty [~~to resolve the allegations informally in the same manner prescribed for certification holders in §109.353 of this title (relating to Disciplinary Actions)~~].

[~~(D) Any Office action under this paragraph which is not informally disposed by agreement or consent order will be considered a contested case and will be handled in accordance with applicable law and Office rules].~~

(b) Authority: Texas Government Code, §§57.022(b)(8), 57.026, and 57.027.

§109.371. Court Interpreter Qualifications in Civil Cases or Depositions Pursuant to Civil Practice and Remedies Code.

(a) A court interpreter in a civil case or deposition in Texas courts must hold a current court interpreter [~~legal~~] certificate issued by the BEI [~~Registry of Interpreters for the Deaf~~] or a current legal [~~court interpreter~~] certificate issued by the RID [~~Board for Evaluation of Interpreters of the Department of Assistive and Rehabilitative Services~~].

(b) Source: Civil Practice and Remedies Code, §21.003.

§109.373. Court Interpreter Qualifications in Criminal Actions Pursuant to Code of Criminal Procedure.

(a) A qualified interpreter in criminal actions in Texas courts, to include arraignments, hearings, examining trials, and trials, for a person who has a hearing impairment that inhibits the person's comprehension of the proceedings or communication with others, must hold a current court interpreter [~~legal~~] certificate issued by the BEI [~~Registry of Interpreters for the Deaf~~] or a current legal [~~court interpreter~~] certificate issued by the RID [~~Board for Evaluation of Interpreters of the Department of Assistive or Rehabilitative Services~~].

(b) Source: Code of Criminal Procedure, Art. 38.31(g).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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SUBCHAPTER D. SPECIALIZED TELECOMMUNICATIONS ASSISTANCE PROGRAM

40 TAC §§109.403, 109.405, 109.407, 109.411, 109.415

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§109.403. Statutory Authority.

The specialized telecommunications program is created under authority of the Utilities Code, Chapter 56, Subchapter E [~~Human Resources Code, Chapter 81 and Senate Bill 667, 75th Texas Legislature, 1997~~].

§109.405. Definitions.

The following words and terms, when used in this subchapter [~~chapter~~], shall have the following meanings, unless the context clearly indicates otherwise.

(1) Application--The forms the Office [~~form DHHS~~] uses to gather and document information about an individual applying for assistance under this program.

(2) - (3) (No change.)

(4) Financial Independence--When two [~~one~~] or more otherwise eligible individuals reside in the same household but are not dependent upon one another for financial support.

(5) - (9) (No change.)

(10) Voucher--A document of record which is issued to eligible applicants with the program and which can be exchanged with a vendor for equipment listed on the face of the voucher and which guarantees payment of up to but not exceeding the amount specified for the listed equipment or services after delivery of the equipment or service.

§109.407. Determination of Basic Equipment or Service.

(a) (No change.)

(b) A list of available equipment or services will be maintained by the Office [~~DHHS~~].

(c) (No change.)

§109.411. Entities Authorized to Certify Disability.

(a) An applicant must be certified as a person with a disability which interferes with the person's ability to access the telephone network. The following can serve as certifiers:

(1) - (3) (No change.)

(4) DARS rehabilitation counselor, or the Office [~~DHHS~~] approved state or federal employee, or the Office [~~DHHS~~] approved state or federal contractor;

(5) - (9) (No change.)

(10) STAP specialist as named in an Office [~~a DHHS~~] STAP Outreach and Training contract, or Office [~~DHHS~~]approved Resource Specialist; or

(11) (No change.)

(b) (No change.)

(c) An application must be certified before the Office [~~DHHS~~] can process and approve the application and issue the voucher.

§109.415. Determination of Voucher Value.

(a) This program provides financial assistance to eligible persons with a disability to enable the persons to purchase a basic specialized telecommunications equipment or service which will provide telephone network access. The value of each voucher is based on the cost of the basic equipment or service necessary to enable the applicant to access the telephone network. The value of the voucher will be determined by the Office [~~DHHS~~].

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER D. REIMBURSEMENT METHODOLOGY FOR INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION (ICF/MR)

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §355.454, concerning Frequency of Reporting Costs and adopts an amendment to §355.457, concerning Fiscal Accountability, in its Reimbursement Rates Chapter. The repeal of §355.454 is adopted without changes to the proposed text as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1203) and will not be republished. The amendment to §355.457 is adopted with changes to the proposed text as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1203). The text of the rule will be republished.

Background and Justification

Section 355.454 concerning Frequency of Reporting Costs outlined the requirements for reporting direct service costs for the ICF/MR program; however, HHSC is repealing this rule as it has been superseded by other rules.

Section 355.457 establishes the fiscal accountability process for the Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) program. HHSC, under its authority and responsibility to administer and implement rates, is updating this rule to clarify and formalize certain requirements relating to required documentation and allowable costs, add procedures for determining recoupments when a provider fails to submit a cost report, and formalize procedures for allowing providers with control of multiple component codes in the program to request to aggregate their reports for purposes of determining compliance with spending requirements.

In addition, the amendment updates administrative procedures relating to notification of recoupment amounts and recoupment of those amounts; removes outdated language; and adds definitions or updates references to other rules due to changes in those rules. The amendment revises allowable cost limitations and the point in the recoupment determination process at which HHSC will notify providers of their recoupment amount. HHSC is also deleting obsolete language regarding: (1) a transitional add-on, (2) references to a subsection that no longer exists, and (3) descriptions of ICF/MR fiscal accountability processes prior to January 1, 1999.

Cost reports are necessary to determine whether providers met their fiscal accountability requirements and if they did not meet their requirements, to determine the amount of funds to be recouped by HHSC or its designee. Currently, the only enforcement tool available to HHSC when a provider fails to submit a cost report is to place the provider's vendor payments on hold until the report is submitted. While vendor hold is an effective enforcement tool in cases where a provider's contract is active, it is not effective in cases where the provider's contract has been terminated. The amended rule creates an incentive for providers whose contracts have been terminated to submit required reports by establishing a process to determine dollars to be recouped from such providers if they do not submit the required reports. The amended rule makes the fiscal accountability system more equitable by ensuring that terminated contracts are subject to fiscal accountability requirements along with ongoing contracts.

Currently, controlling entities are permitted to request evaluation of spending requirements for all of their controlled entities within the ICF/MR program in the aggregate, but there are no rules defining an entity or control for this purpose. This lack of rules leads to difficulties and confusion in the administration of the aggregation process. The amendment formalizes current administrative procedures, which should result in an increased understanding of the aggregation process and of provider requirements. The amendment should also reduce areas of disagreement between providers and HHSC as to how the aggregation process is applied.

Additional changes update the rule to clarify and formalize current administrative practices, delete other outdated language and ensure that documentation requirements, spending requirements notification requirements, and recoupment collection processes are clearly outlined in rule.

Comments

The 30-day comment period ended March 17, 2008. During this period, HHSC received comments regarding the proposed amendment to §355.457 from representatives of the Private Providers Association of Texas, various ICF/MR provider chains, and individual ICF/MR providers. Some commenters submitted additional comments that did not relate to the proposed rules. A summary of the comments relating to the proposed rules and HHSC's responses follows:

General comment concerning §355.457. One commenter recommended that any rule having the potential to negatively impact a provider and/or its operations not be assigned an effective date until the end of the current cost reporting period.

Response: Typically, a rule takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is specified as the effective date in the rule. It is not appropriate to have different effective dates depending upon whether a section of a rule is favorable or unfavorable to a specific class of providers. HHSC did not change the proposed rule in response to this comment.

Comment concerning §355.457(c)(2). Four commenters recommended modifying this paragraph to state that "HHSC or its designee will recoup any amount owed from a provider's vendor payment(s) following the date of the notification letter only after a final judgment on an appeal or expiration of appeal deadline, whichever is later." One commenter stated that even though it is HHSC's position that it does not recoup funds until appeals are exhausted they have experienced the opposite.

Response: HHSC does not pursue collection of owed funds until appeals are exhausted. The example to the contrary provided by the commenter referred to recoupments relating to eligibility determination which are not governed by this rule. The wording proposed for this paragraph parallels current wording in rules for all other long term care programs subject to recoupments by HHSC or its designee for failure to meet specific fiscal accountability requirements. HHSC did not change the proposed rule in response to this comment.

Comment concerning §355.457(c)(5). Five commenters recommended modifying this paragraph to more closely parallel current business practices wherein organizations not owned by the same parent company are owned and controlled by the same individual or group of individuals.

Response: HHSC has modified this paragraph to allow for aggregation in cases where a group of five or fewer persons who are individuals, estates or trusts own two or more corporations and the group owns at least 50 percent of total voting power or value in the corporations when only identical ownership is considered.

Comment concerning §355.457(c)(5)(F): One commenter recommended modifying this subparagraph to provide for a process for correction in the event of an inadvertent error in reporting/disclosure of controlled component codes.

Response: HHSC has determined that proposed subparagraph (F) is superfluous because subparagraph (B) will require that all ICF/MR component codes controlled by an entity at the end of its fiscal year or at the effective date of the change of ownership or termination of its last ICF/MR contract be included in the aggregation calculations. As a result, HHSC has deleted proposed subparagraph (F).

1 TAC §355.454

The repeal is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021, and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 5, 2008.

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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Proposal publication date: February 15, 2008
For further information, please call: (512) 424-6900

1 TAC §355.457

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021, and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

§355.457. Fiscal Accountability.

(a) General principles. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction). Fiscal accountability is a process used to gauge the ongoing financial performance under the non-state operated facility reimbursement rates.

(b) Annual reporting. Fiscal accountability will consist of the annual reporting of direct service costs from all non-state operated providers. The data will be collected on a cost report designed by HHSC in accordance with §355.105(b) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(1) Direct service costs include costs associated with personnel who provide direct hands-on support for consumers and include personnel such as direct care workers, first-level supervisors of direct care staff, Qualified Mental Retardation Professional (QMRPs), as defined in 42 Code of Federal Regulations, Part 483, Subpart I, §483.430, registered nurses, and licensed vocational nurses. Direct service costs include: costs related to wages, benefits, payroll taxes, and contracts for direct services. Accrued leave (sick or annual) can only be considered a direct service cost if the employee has a right to the cash value of that leave upon termination.

(2) The provider is responsible for submission of the fiscal accountability cost report to HHSC, and payment of amounts owed in accordance with subsection (c) of this section, regardless of whether the provider contracts with another entity for the management or operation of the ICF/MR.

(A) If the provider contracts with another entity for the management or operation of the ICF/MR, the provider must report the specific direct services costs of that entity as required in the cost report instructions and not the amount for which the provider is contracting for the entity's services.

(B) For staff whose duties include work other than the provision of direct services for the provider, time spent providing direct services and associated expenses may be reported as direct service costs if properly documented in accordance with §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(C) Allowable compensation for owners and related parties and definitions of owners and related parties are specified in §355.102(i) and §355.103(b)(2) of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs).

(i) Owners and related-parties who provide multiple types of direct service, both direct care and indirect services and/or both direct hands-on support and first-level supervision of direct care workers must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to the compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(ii) Allowable hours, hourly wage rate and benefits for direct service work must be the lesser of the actual hours worked, hourly wage rate paid and benefits paid or the hours, hourly wage rate and benefits for a comparable direct care staff person assumed in the fully-funded model. The fully-funded model is the model as calculated under §355.456(d) of this title (relating to Reimbursement Methodology) prior to any adjustments made in accordance with §355.101 of this title (relating to Introduction) and §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs) for the rate period.

(iii) If at least 40 percent of total labor hours in a specific related-party's direct service type were provided by non-related-parties, the related-party's hourly wage rate may be the higher of the model assumption for that direct service type described in clause (ii) of this subparagraph or the non-related party average for that direct service type, so long as the non-related party average does not exceed the related-party's actual hourly wage.

(iv) During any single fiscal year, the sum of all direct care hours reported on ICF/MR cost report(s) for any individual owner or related party cannot exceed 2,600.

(v) Hours, hourly wages and benefits above the limits described in clauses (ii) - (iv) of this subparagraph are to be reported as administrative hours, hourly wages and benefits.

(3) The Department of Aging and Disability Services (DADS) will place a vendor hold on a prior owner at a change of ownership which results in the execution of a new provider agreement or a contract termination. The prior owner must submit a cost report to HHSC for the current reporting period. Upon receipt of an acceptable cost report and resolution of any outstanding balances, the vendor hold will be released.

(4) Providers with an ownership change from one legal entity to a different legal entity or a contract termination that do not submit a cost report for the fiscal year of the ownership change or contract termination within 60 days of the change of ownership or contract termination are subject to recoupment of funds related to fiscal accountability as described in subsection (c)(1)(D) of this section. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in subsection (c)(1)(A) - (C) of this section. If an acceptable cost report is not received within 365 days of the change of ownership or contract termination date, the recoupment will become permanent.

(5) Providers that do not submit a cost report completed in accordance with all applicable rules and instructions within 60 days of the placement of a vendor hold due to the failure to submit the cost report are subject to an immediate recoupment of funds related to fiscal accountability as described in subsection (c)(1)(D) of this section. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in subsection (c)(1)(A) - (C) of this section. If an acceptable cost report is not received within 365 days of the due date, the recoupment will become permanent.

(6) For cost reports pertaining to providers' fiscal years ending in calendar year 2004 and subsequent years the following applies:

(A) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(B) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs).

(C) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(7) Field Audit and Desk Review. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).

(8) Reviews of exclusions or adjustments. An ICF/MR provider who disagrees with HHSC's exclusion or adjustment of items in cost reports may request an informal review and, when appropriate, an administrative hearing as specified in §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(c) HHSC will require providers to report all direct costs incurred in their annual fiscal year. HHSC will compare the reported direct service costs to the direct service cost component of the modeled rates.

(1) The total direct service revenue of the modeled rates is the direct service portion of the rate multiplied by the number of allowable units paid for services provided during the reporting period.

(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers whose direct service costs are less than 85% of the direct service revenues will be required to pay to HHSC or its designee the difference between the direct service costs and 95% of the direct service revenues.

(C) Providers whose direct service costs are less than 90% but greater than or equal to 85% of the direct service revenues will be required to pay to HHSC or its designee 75% of the difference between the direct service costs and 90% of the direct service revenues.

(D) Providers who do not submit an acceptable cost report as described in subsection (b)(4) or (5) of this section will be assumed to have direct service costs equal to 65% of the direct services revenues and HHSC or its designee will recoup the difference between 65% of the direct services revenues and 95% of the direct service revenues, subject to the provisions of subsection (b)(4) or (5) of this section.

(2) Providers will be notified, by certified mail, within 90 days of the determination of their recoupment amount by HHSC of the amount to be repaid to HHSC or its designee. If a subsequent review by HHSC or audit results in adjustments to the Cost Report as described in subsection (b)(7) of this section that changes the amount to be repaid to HHSC or its designee, the provider will be notified in writing of the adjustments and the adjusted amount to be repaid. HHSC or its designee will recoup any amount owed from a provider's vendor payment(s) following the date of the notification letter.

(3) Repayment will be collected from the following:

(A) the provider or legal entity submitting the report;

(B) any other legal entity responsible for the debts or liabilities of the submitting entity; or

(C) the legal entity on behalf of which a report is submitted.

(4) For providers undergoing an ownership change or contract termination, HHSC or its designee will recoup any amount owed from the provider's vendor payments that are being held. In cases where funds identified for recoupment cannot be repaid from the held vendor payments, the responsible entity from paragraph (3) of this subsection will be jointly and severally liable for any additional payment due to HHSC or its designee. Failure to repay the amount due or submit an acceptable payment plan within 60 days of notification will result in the recoupment of the owed funds from other Medicaid contracts controlled by the responsible entity, placement of a vendor hold on all Medicaid contracts controlled by the responsible entity and will bar the responsible entity from receiving any new contracts with HHSC or its designee until repayment is made in full. The responsible entity for these contracts will be notified as described in paragraph (2) of this subsection prior to the recoupment of owed funds, placement of vendor hold and barring of new contracts.

(5) Aggregation.

(A) Definitions. The following words and terms have the following meanings when used in this paragraph.

(i) Aggregation. For an entity defined in clause (iii) of this subparagraph that controls, as defined in clause (iv) of this subparagraph, more than one ICF/MR component code, the process of determining compliance with the spending requirements detailed in paragraph (1) of this subsection for all component codes controlled by the entity in the aggregate rather than requiring each component code to meet its spending requirement individually. For commonly owned corporations defined in clause (ii) of this subparagraph, the process of determining compliance with the spending requirements detailed in paragraph (1) of this subsection for all component codes in the controlled small group in the aggregate rather than requiring each component code to meet its spending requirement individually. Corporations that do not meet the definitions under clauses (ii) - (iii) of this subparagraph are not eligible for aggregation.

(ii) Commonly owned corporations--two or more corporations where five or fewer identical persons who are individuals, estates, or trusts own greater than 50 percent of the total voting power in each corporation.

(iii) Entity--a parent company, sole member, individual, limited partnership, or group of limited partnerships controlled by the same general partner.

(iv) Control--greater than 50 % ownership by the entity.

(B) Component Codes Included in Aggregation. If an entity controlling more than one ICF/MR component code or commonly owned corporations requests aggregation, compliance with the spending requirements will be evaluated in the aggregate for all ICF/MR component codes that the entity or commonly owned corporations controlled at the end of its fiscal year or at the effective date of the change of ownership or termination of its last ICF/MR contract.

(C) Aggregation Request. To exercise the aggregation option, the entity or commonly owned corporations must submit an aggregation request, in a manner prescribed by HHSC, at the time each cost report is submitted. In limited partnerships in which the same single general partner controls all the limited partnerships, that single general partner must make this request. Other such aggregation requests will be reviewed on a case-by-case basis.

(D) Frequency of Aggregation Requests. The entity or commonly owned corporations must submit a separate request for aggregation for each reporting period.

(E) Ownership Changes and Contract Terminations. ICF/MR contracts that change ownership or terminate effective after the end of the applicable reporting period, but prior to the determination of compliance with spending requirements as per paragraph (1) of this subsection, are excluded from all aggregate spending calculations. These contracts' compliance with spending requirements will be determined on an individual basis and the costs and revenues will not be included in the aggregate spending calculation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 5, 2008.

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Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

SUBCHAPTER F. REIMBURSEMENT METHODOLOGY FOR PROGRAMS SERVING PERSONS WITH MENTAL ILLNESS AND MENTAL RETARDATION

1 TAC §355.722

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.722, concerning Reporting Costs by Home and Community-based Services (HCS) Providers, in its Reimbursement Rates Chapter. The amendment is adopted with changes to the proposed text as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1203).

Background and Justification

This rule establishes the cost reporting and fiscal accountability process for the Home and Community-based Services (HCS) waiver program and outlines the requirements of reporting direct service costs for the HCS waiver program. HHSC, under its authority and responsibility to administer and implement rates,

is updating this rule by clarifying and formalizing certain requirements related to documentation and allowable costs, adding procedures for determining recoupments when a provider fails to submit a cost report, and formalizing procedures for allowing providers with control of multiple component codes in the program to request to aggregate their reports for purposes of determining compliance with spending requirements.

In addition, the amendment updates administrative procedures relating to notification of recoupment amounts and adds definitions or updates references to other rules due to changes in those rules. The amendment revises allowable cost limitations and the point in the recoupment determination process at which HHSC will notify providers of their recoupment amount and deletes obsolete language regarding: (1) Mental Retardation Local Authority conversion, and (2) references to a subsection that no longer exists.

Cost reports are necessary to determine whether providers met their fiscal accountability requirements, and if they did not meet their requirements, to determine the amount of funds to be recouped by HHSC or its designee. Currently, the only enforcement tool available to HHSC when a provider fails to submit a cost report is to place the provider's vendor payments on hold until the report is submitted. While vendor hold is an effective enforcement tool in cases where a provider's contract is active, it is not effective in cases where the provider's contract has been terminated. The amended rule creates an incentive for providers whose contracts have been terminated to submit required reports by establishing a process to determine dollars to be recouped from such providers if they do not submit the required reports. The amended rule makes the fiscal accountability system more equitable by ensuring that terminated contracts are subject to fiscal accountability requirements along with ongoing contracts.

Currently, controlling entities are permitted to request evaluation of spending requirements for all of their controlled entities within the HCS program in the aggregate but there are no rules defining an entity or control for this purpose. This lack of rules leads to difficulties and confusion in the administration of the aggregation process. The amendment formalizes current administrative procedures, which should result in increased understanding of the aggregation process and requirements by providers. The amendment should reduce areas of disagreement between providers and HHSC as to how the aggregation process is applied.

Comments

The 30-day comment period ended March 17, 2008. During this period, HHSC received comments regarding the proposed amendment to §355.722 from representatives of the Private Providers Association of Texas and various ICF/MR provider chains and individual ICF/MR providers. Some commenters submitted additional comments that did not relate to the proposed rules. A summary of the comments relating to the proposed rules and HHSC's responses follows:

General comment concerning §355.722. One commenter recommended that any rule having the potential to negatively impact a provider and/or its operations not be assigned an effective date until the end of the current cost reporting period.

Response: Typically, a rule takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is specified as the effective date in the rule. It is not appropriate to have different effective dates depending upon whether a section of a rule is favorable or unfavorable to a specific class of providers. HHSC did not change the proposed rule in response to this comment.

Comment concerning §355.722(j)(5). Four commenters recommended modifying this paragraph to state that "HHSC or its designee will recoup any amount owed from a provider's vendor payment(s) following the date of the notification letter only after a final judgment on an appeal or expiration of appeal deadline, whichever is later." One commenter stated that even though it is HHSC's position that it does not recoup funds until appeals are exhausted they have experienced the opposite.

Response: HHSC does not pursue collection of owed funds until appeals are exhausted. The example to the contrary provided by the commenter referred to recoupments relating to eligibility determination which are not governed by this rule. The wording proposed for this paragraph parallels current wording in rules for all other long term care programs subject to recoupments by HHSC or its designee for failure to meet specific fiscal accountability requirements. HHSC is adopting this paragraph without change.

Comment concerning §355.722(j)(8). Five commenters recommended modifying this paragraph to more closely parallel current business practices wherein organizations not owned by the same parent company are owned and controlled by the same individual or group of individuals.

Response: HHSC has modified this paragraph to allow for aggregation in cases where a group of five or fewer persons who are individuals, estates or trusts own two or more corporations and the group owns at least 50 percent of total voting power or value in the corporations when only identical ownership is considered.

Comment concerning §355.722(j)(8)(F): One commenter recommended modifying this subparagraph to provide for a process for correction in the event of an inadvertent error in reporting/disclosure of controlled component codes.

Response: HHSC has determined that proposed subparagraph (F) is superfluous because subparagraph (B) will require that all ICF/MR component codes controlled by an entity at the end of its fiscal year or at the effective date of the change of ownership or termination of its last ICF/MR contract be included in the aggregation calculations. As a result, HHSC has deleted proposed subparagraph (F).

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021, and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

§355.722. Reporting Costs by Home and Community-based Services (HCS) Providers.

(a) On an annual basis, all providers must submit cost reports as directed by HHSC or its designee and in accordance with this subchapter. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

(1) Direct service costs are defined to include costs associated with personnel who provide direct hands-on support for con-

sumers and include personnel such as direct care workers, first-level supervisors of direct care workers, registered nurses, licensed vocational nurses, and other personnel who provide activities of daily living training and clinical program services. Direct service costs include: costs related to wages, benefits, payroll taxes, and contracts for direct services. Accrued leave (sick or vacation) can only be considered a direct service cost if the employee has a right to a cash value of that leave upon termination.

(2) For staff whose duties include work other than the provision of direct services for the provider, time spent providing direct services and associated expenses may be reported as direct service costs if properly documented in accordance with §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(3) Providers must report the following costs:

(A) Staff wages related to the delivery of direct services including residential assistance, day habilitation services, and the direct supervision of the delivery of these services.

(B) These costs may be either the provider's actual expense or contracted expenditures.

(b) Reviews of exclusions or adjustments. A provider who disagrees with HHSC's exclusion or adjustment of items in cost reports may request an informal review and, when appropriate, an administrative hearing as specified in §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(c) Field audit and desk review. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports).

(d) Notification of exclusions and adjustments. HHSC will notify a provider of the results of a desk review or field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).

(e) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(f) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs).

(g) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(h) Allowable compensation for owners and related parties and definitions of owners and related parties are specified in §355.102(i) and §355.103(b)(2) of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs).

(1) Owners and related parties who provide multiple types of direct service, both direct care and indirect services and/or both direct hands-on support and first-level supervision of direct care workers must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to the compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) Allowable hours, hourly wage rate and benefits for direct service work must be the lesser of the actual hours worked, hourly wage rate paid and benefits paid or the hours, hourly wage rate and benefits for a comparable direct care staff person assumed in the fully-funded model. The fully-funded model is the model as calculated under §355.723(d) of this title (relating to Reimbursement Methodology for Home and Community-based Services) prior to any adjustments made in accordance with §355.101 of this title (relating to Introduction) and §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs) for the rate period.

(3) If at least 40 percent of total labor hours in a specific related-party's direct service type were provided by non-related-parties, the related-party's hourly wage rate may be the higher of the model assumption for that direct service type described in paragraph (2) of this subsection or the non-related party average for that direct service type, so long as the non-related party average does not exceed the related-party's actual hourly wage.

(4) During any single fiscal year, the sum of all direct care hours reported on HCS cost report(s) for any individual owner or related party cannot exceed 2,600.

(5) Hours, hourly wages and benefits above the limits described in paragraphs (2) - (4) of this subsection are to be reported as administrative hours, hourly wages and benefits.

(i) Each provider's total reported allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost-reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices). HHSC may adjust reimbursement if new legislation, regulations, or economic factors affect costs, according to §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

(j) Fiscal Accountability.

(1) General principles. Fiscal accountability is a process used to gauge the ongoing financial performance under the reimbursement rates.

(2) Annual reporting. Fiscal accountability will consist of the annual reporting of the direct service costs including wages, and benefits, from all providers. The data will be collected on a cost report designed by HHSC in accordance with §355.105(b) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(A) The Department of Aging and Disability Services (DADS) will place a vendor hold on payments to a provider whose provider agreement is being assigned or terminated. The provider will submit a cost report for the current reporting period to HHSC. Upon receipt of an acceptable cost report and repayment of any amounts due in accordance with this section, the vendor hold will be released.

(B) Providers that do not submit a cost report completed in accordance with all applicable rules and instructions within 60 days of the placement of a vendor hold due to the failure to submit the cost report are subject to an immediate recoupment of funds related to fiscal accountability as described in paragraph (4)(E) of this subsection. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in paragraphs (5) - (7) of this subsection. If an acceptable cost report

is not received within 365 days of the due date, the recoupment will become permanent.

(C) Providers with an ownership change from one legal entity to a different legal entity or a contract termination that do not submit a cost report for the fiscal year of the ownership change or contract termination within 60 days of the change of ownership or contract termination are subject to recoupment of funds related to fiscal accountability as described in paragraph (4)(E) of this subsection. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in paragraphs (5) - (7) of this subsection. If an acceptable cost report is not received within 365 days of the change of ownership or contract termination date, the recoupment will become permanent.

(3) HHSC will require providers to report all direct costs incurred on an annual fiscal year basis. HHSC will compare the reported direct service costs to the total direct service revenue.

(4) Direct Service Revenues are calculated by multiplying the number of units eligible for payment that have been paid for services delivered during the reporting period times the appropriate direct service portion of the rate for the service billed.

(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers whose direct service costs are less than 90% but greater than or equal to 85% of the direct service revenues will be required to pay to DADS 50% of the difference between the direct service costs and 90% of the direct service revenues.

(C) Providers whose direct service costs are less than 85% but greater than or equal to 80% of the direct service revenues will be required to pay to DADS 100% of the difference between the direct service costs and 85% of the direct service revenues plus 50% of the difference between 85% and 90% of the direct service revenues.

(D) Providers whose direct service costs are less than 80% of the direct service revenues will be required to pay to DADS the difference between the direct service costs and 95% of the direct service revenues.

(E) Providers who do not submit a cost report as described in paragraph (2)(B) or (C) of this subsection will be assumed to have direct service costs equal to 65% of the direct services revenues and will be required to pay to DADS the difference between 65% of the direct services revenues and 95% of the direct service revenues, subject to the provisions of paragraph (2)(B) or (C) of this subsection.

(5) Where applicable, providers will be notified, by certified mail, within 90 days of the determination of their recoupment amount by HHSC of the amount to be repaid to HHSC or its designee. If a subsequent review by HHSC or audit results in adjustments to the cost report as described in subsection (a) of this section that change the amount to be repaid to HHSC or its designee, the provider will be notified in writing of the adjustments and the adjusted amount to be repaid. Providers will submit the repayment amount within 60 days of notification.

(6) Repayment will be made by the following:

(A) the provider or legal entity submitting the report;

(B) any other legal entity responsible for the debts or liabilities of the submitting entity; or

(C) the legal entity on behalf of which a report is submitted.

(7) Providers required to repay revenues to DADS will be jointly and severally liable for any repayment. DADS will apply a vendor hold on Medicaid payments to a provider for not making the payment to DADS within 60 days of receiving notice.

(8) Aggregation.

(A) Definitions. The following words and terms have the following meanings when used in this paragraph.

(i) Aggregation. For an entity defined in clause (iii) of this subparagraph that controls, as defined in clause (iv) of this subparagraph, more than one HCS component code, the process of determining compliance with the spending requirements detailed in paragraph (4) of this subsection for all component codes controlled by the entity in the aggregate rather than requiring each component code to meet its spending requirement individually. For commonly owned corporations defined in clause (ii) of this subparagraph, the process of determining compliance with the spending requirements detailed in paragraph (4) of this subsection for all component codes in the controlled small group in the aggregate rather than requiring each component code to meet its spending requirement individually. Corporations that do not meet the definitions under clauses (ii) - (iii) of this subparagraph are not eligible for aggregation.

(ii) Commonly owned corporations--two or more corporations where five or fewer identical persons who are individuals, estates, or trusts own greater than 50 percent of the total voting power in each corporation.

(iii) Entity--a parent company, sole member, individual, limited partnership, or group of limited partnerships controlled by the same general partner.

(iv) Control--greater than 50% ownership by the entity.

(B) Component Codes Included in Aggregation. If an entity controlling more than one HCS component code or commonly owned corporations requests aggregation, compliance with the spending requirements will be evaluated in the aggregate for all HCS component codes that the entity or commonly owned corporations controlled at the end of its fiscal year or at the effective date of the change of ownership or termination of its last HCS contract.

(C) Aggregation Request. To exercise the aggregation option, the entity or commonly owned corporations must submit an aggregation request, in a manner prescribed by HHSC, at the time each cost report is submitted. In limited partnerships in which the same single general partner controls all the limited partnerships, that single general partner must make this request. Other such aggregation requests will be reviewed on a case-by-case basis.

(D) Frequency of Aggregation Requests. The entity or commonly owned corporations must submit a separate request for aggregation for each reporting period.

(E) Ownership Changes and Contract Terminations. HCS contracts that change ownership or terminate effective after the end of the applicable reporting period, but prior to the determination of compliance with spending requirements as per paragraph (4) of this subsection, are excluded from all aggregate spending calculations. These contracts' compliance with spending requirements will be determined on an individual basis and the costs and revenues will not be included in the aggregate spending calculation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 5, 2008.

TRD-200802902
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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Proposal publication date: February 15, 2008
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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 1. GENERAL PROCEDURES

The Texas Department of Agriculture (the department) adopts amendments to Chapter 1, Subchapter A, §1.24 and §1.30, concerning General Rules of Practice; Subchapter B, §1.53, concerning Collection of Debts; Subchapter C, §1.71 and §§1.73 - 1.78, concerning Minority Purchasing; Subchapter H, §§1.400, 1.402 and 1.404, concerning Public Information Requests; Subchapter K, §1.700 and new §1.701, concerning Employee Training Rules; and an amendment to Subchapter N, §1.923, concerning the department's Food and Fibers Research Grant Program, and the repeal of Subchapter D, §1.85, concerning Miscellaneous Provisions; Subchapter E, §1.205, concerning Advisory Committees; Subchapter G, §1.300, concerning Interagency Agreements; Subchapter H, §1.401 and §1.403, concerning Public Information Requests; and Subchapter K, §1.701, concerning Employee Training Rules, without changes to the proposal published in the April 25, 2008, issue of the *Texas Register* (33 TexReg 3363).

The amendment to §1.24 is adopted to clarify processes regarding witness fees. The amendment to §1.30 is adopted to correct typographical errors. The amendment to §1.53 adds any obligation of the Department to attempt to recover a debt that is imposed by federal law, contract or other agreement to the list of what the department will consider in making a determination of whether to refer a debt collection matter to the attorney general. The amendments to §1.71 and §§1.73 - 1.78 are adopted to update legal citations, terms and references to the state purchasing agency in the department's minority purchasing rules. More specifically, the amendments reflect that the small businesses and minority owned businesses are now considered as part of the term Historically underutilized business (HUB) and that the purchasing agency is now the Comptroller of Public Accounts. The amendments to §§1.400, 1.402 and 1.404 are adopted to update references to the department's public information officer and to the agency responsible for administering the state public information program, now the Office of the Attorney General, and update information on payment of charges for public information to reflect the department's current practice. The amendment of §1.700 and new §1.701 are adopted to make the sections consistent with current state law regarding employee training. The amendment to §1.923 is adopted to make the section consistent with amendments made to Texas Agriculture Code, Chapter 42 during the 80th Legislative Session (2007). The law was amended to change the representative of the Southwest Peanut Growers Association to a representative of the peanut industry, due to the dissolution of the Southwest Peanut Growers Association.

The repeal of §1.85 is adopted to eliminate a provision for the use of unmarked vehicles by the department in its enforcement of weights and measures laws. The department no longer utilizes undercover vehicles for enforcement purposes. The repeal of §1.205 removes the Organic Certification Review and Standards Advisory Committee from the list of the department's advisory committees. This committee was eliminated due to the establishment of the Texas Organic Agriculture Industry Advisory Board by the 80th Legislature (2007), whose duties include those carried out by the Organic Certification Review and Standards Advisory Committee. The repeal of §1.300 eliminates the Memorandum of Understanding Among the Texas Department of Agriculture, the Texas Agricultural Finance Authority and the Texas Department of Economic Development. The law under which this memorandum was established has been repealed. In addition, the Texas Department of Economic Development has been abolished and some of its duties transferred to the Office of the Governor and other agencies. The repeal of §1.401 and §1.403 is adopted to delete unnecessary sections. The requirements contained in §1.401 and §1.403 are already specified in the Public Information Act and/or the rules of the Office of the Attorney General. The repeal of §1.701 is adopted to eliminate a section that is unnecessary and replace it with a new section that includes provisions regarding employee training and education required by state law.

No comments were received on the proposal.

SUBCHAPTER A. GENERAL RULES OF PRACTICE

4 TAC §1.24, §1.30

The amendments to §1.24 and §1.30 are adopted under the Texas Agriculture Code (the Code), §12.016, which provides the department with the authority to adopt rules to carry out its duties under the Code; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 9, 2008.

TRD-200802994
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Texas Department of Agriculture
Effective date: June 29, 2008
Proposal publication date: April 25, 2008
For further information, please call: (512) 463-4075

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SUBCHAPTER B. COLLECTION OF DEBTS

4 TAC §1.53

The amendment to §1.53 is adopted under the Texas Government Code, §2107.02, which provides that a state agency shall adopt debt collection procedures by rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. MINORITY PURCHASING

4 TAC §§1.71, 1.73 - 1.78

The amendments to §1.71 and §§1.73 - 1.78 are adopted under the Texas Agriculture Code, §12.029, which requires that the department establish by rule policies to encourage historically underutilized businesses to bid for contract and open market purchases of the department; and the Texas Government Code, §2161.003, which provides that a state agency shall adopt the rules of the Texas Comptroller of Public Accounts relating to administration of the Historically Underutilized Businesses (HUB) program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. MISCELLANEOUS PROVISIONS

4 TAC §1.85

The repeal of §1.85 is adopted under Texas Government Code, §2171.1045 which provides that each state agency shall adopt rules relating to the assignment and use of the agency's vehicles.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. ADVISORY COMMITTEES

4 TAC §1.205

The repeal of §1.205 is adopted under the Texas Government Code, §2110.005, which requires an agency that establishes an advisory committee to adopt rules relating to the committee; and the Texas Agriculture Code (the Code), §12.016, which authorizes the department to adopt rules necessary to carry out its duties under the Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. INTERAGENCY AGREEMENTS

4 TAC §1.300

The repeal of §1.300 is adopted under Texas Agriculture Code (the Code) §12.016, which authorizes the department to adopt rules necessary to carry out its duties under the Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER H. REQUESTS FOR PUBLIC INFORMATION

4 TAC §§1.400, 1.402, 1.404

The amendments to §§1.400, 1.402 and 1.404 are adopted under the Texas Government Code, §2001.004, which provides

that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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4 TAC §1.401, §1.403

The repeal of §1.401 and §1.403 is adopted under the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER K. EMPLOYEE TRAINING RULES

4 TAC §1.700, §1.701

The amendments to §1.700 and new §1.701 are adopted under the Texas Government Code, §656.048, which provides that a state agency shall adopt rules related to training and education; and §656.046 which sets forth what a state agency's training program shall include.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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4 TAC §1.701

The repeal of §1.701 is adopted under the Texas Government Code, §656.048, which provides that a state agency shall adopt rules related to training and education; and §656.046 which sets forth what a state agency's training program shall include.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER N. FOOD AND FIBERS RESEARCH GRANT PROGRAM RULES

4 TAC §1.923

The amendment to §1.923 is adopted under the Texas Agriculture Code, §42.001, which authorizes the department by rule to develop a program to award grants to assist the fibers and oilseeds industries in this state by supporting applied research related to fibers and oilseeds.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 8. PIPELINE SAFETY REGULATIONS

SUBCHAPTER C. REQUIREMENTS FOR NATURAL GAS PIPELINES ONLY

16 TAC §§8.206 - 8.208

The Railroad Commission of Texas (Commission) adopts new §§8.206 - 8.208, relating to Risk-Based Leak Survey Program, Leak Grading and Repair, and Mandatory Removal and Replacement Program, with changes from the versions published

in the December 7, 2007, issue of the *Texas Register* (32 TexReg 8993). The adopted rules require Texas gas distribution companies to establish a risk-based schedule of increased leak inspections; standardize leak grading and repair time frames; and repair or remove and replace certain compression couplings due to leaks or serviceability. The rules are adopted to enhance the Commission's pipeline safety program. The Commission adopts a specific effective date of September 1, 2008, for these new rules.

Background on the Proposed Rules

The Commission's pipeline safety regulations in effect prior to this rulemaking contained two time frames for conducting leak surveys: once each calendar year not to exceed 15 months for areas identified as business districts, and once every five years for those areas outside of business districts. Based on the Commission's success with risk modeling for pipeline integrity management, the Commission proposed to adopt a risk-based leak inspection program to more adequately address the pipelines that potentially pose the greatest risk of leaking. As proposed, operators would create a risk model using five risk factors relating to the physical characteristics and environment of the pipeline segment. The factors included pipe location, nature of the pipe system, the history of corrosion, environmental considerations regarding gas migration, and other factors including weather, construction activity, and operator judgment. Based on a risk ranking from high to low, operators of gas distribution systems would schedule leak inspections for a given pipeline segment at a time interval appropriate to address the identified risk.

The Commission proposed a slightly revised version of the Gas Piping Technology Committee (GPTC) standards in ANSI Z380.1. Under the standards developed by the GPTC, identified leaks are graded by their degree of hazard. The GPTC, formerly known as the Gas Piping Standards Committee, is an ANSI Accredited Standards Committee (ASC) designated as GPTC/Z380 which maintains and develops ANSI Z380.1, Guide for Gas Transmission and Distribution Systems (Guide), first issued in 1970. GPTC members include persons with expertise from the natural gas transmission, distribution, and manufacturing fields, as well as from federal and state regulatory agencies. The GPTC has approximately 80 members, 40 of which have voting rights and are known as the Main Body. The Main Body is balanced in accordance with ANSI requirements under the following categories: gas transmission, gas distribution, manufacturing, regulatory, and the general interest. The GPTC is structured into three Divisions and has a number of standing task groups and sections that develop and approve guide material. Generally, leaks are classified as Grade 1, which is the most hazardous; Grade 2; or Grade 3, which is the least hazardous. Under the GPTC's guidelines, a Grade 1 leak represents an existing or probable hazard to persons or property and requires immediate action to eliminate the hazard and make repairs; Grade 2 leaks are non-hazardous at the time of detection, but are required to be scheduled for repair within a year; and Grade 3 leaks are non-hazardous at the time of detection and reasonably can be expected to remain non-hazardous. The GPTC does not set a time frame within which Grade 3 leaks must be repaired.

Under the Commission's proposal, Grade 1 leaks would still be required to be repaired immediately. The Commission proposed a more stringent time frame than the GPTC's for repair of Grade 2 and Grade 3 leaks, as follows: Grade 2 leaks would be re-evaluated monthly and repaired no later than six months from the date of detection; Grade 3 leaks would be re-evaluated once each calendar year, not to exceed 15 months and repaired no later than three years from detection.

Finally, the Commission proposed that for leaks identified on any compression coupling used to join steel pipe, each operator must either replace the leaking compression coupling or repair it using a sleeve welded over the compression coupling. For leaks identified on any compression coupling used to join plastic pipe, each operator must replace the leaking compression coupling. For any other compression coupling used to join plastic pipe that is exposed during operation and maintenance activities, each operator must determine whether the coupling is manufactured and designed to withstand pull-outs, and must replace those compression couplings used to join plastic pipe that the operator identifies as potentially susceptible to pull-outs. In addition, if an operator is unable to determine that a compression coupling was designed with two forms of resistance to pull-outs, the operator must replace the coupling. Each gas distribution operator would be required to remove and replace any and all compression couplings at presently known service riser installations if they are not manufactured and installed with secondary restraint and if they are not resistant to pull-outs. The removal and replacement of such compression couplings must be completed within two years of the effective date of the rule. A progress report is required at the end of each six-month period detailing the number of service riser installations checked, the condition of the coupling, and the total number of compression couplings replaced.

As early as 1997, the Commission introduced the concept of risk-based leakage surveys to the natural gas distribution operators in Texas. At the time the concept was developed, Safety Division staff met with operators of both large and small distribution systems in Texas to discuss the possibility of each operator creating a risk-based model, based on established risk factors, for scheduling and conducting leak surveys of their pipeline systems. The Safety Division staff recommended the use of the model as an alternative to a prescriptive based regulation to increase leak survey frequencies. Operators also were given the opportunity to work within the risk-based scheduling model in the ongoing program to comply with pipeline safety regulations. Safety Division staff had determined that conducting leakage surveys in some areas at five-year intervals was too infrequent. For example, the sample model discussed the need for more frequent leakage surveys in those systems that had been experiencing leaks in steel pipe installed prior to the requirement for cathodic protection. Staff also confirmed the five-year leakage survey period for new polyethylene lines installed below ground in areas that were not subject to third-party damage (identified in the model as the greatest risk for damage). One operator successfully adopted the model and began conducting leak surveys using the risk-based schedule.

In the December 7, 2007, proposed rulemaking published in the *Texas Register*, the Commission proposed to incorporate this risk model into the current requirements for natural gas distribution system for two reasons. The first reason was the changes in the operations of gas distribution systems in Texas. The Commission identified those risks that affect the continued safe operation of pipelines. By adopting this model as the minimum standard, each operator could apply the risk factors to its pipeline system or segments within its system to determine if more frequent leak surveys are warranted for enhanced safety.

The second reason was to reduce the number of leaks that may have been leaking over an extended period of time. For exam-

ple, if a leakage survey is conducted on an annual basis and a Grade 2 or Grade 3 leak is identified, the leak would be repaired within six months to 36 months. If the leak survey frequency remains at the minimum five-year interval, the leak could remain unrepaired for that entire period of time. This change in the survey frequency, coupled with the shorter deadlines for making leak repairs, would mean that more leaks will be repaired sooner.

Additionally, the leak survey model proposed in §8.206 would go hand-in-hand with the distribution integrity management rules being developed by the federal Office of Pipeline Safety. Leak survey, leak monitoring, and leak repair are very important factors in the integrity assessment and management of pipeline systems. The implementation of a risk model and consistent leak grading and repair procedures at the distribution system level would allow Texas operators to assess the overall integrity of their systems and manage them according to the federal requirements.

The proposed leak grading and repair model in §8.207 would provide a consistent application of what a "graded" leak is in Texas. For many years, operators throughout Texas (and the United States) have used different standards to characterize the severity of leaks. The Commission proposed the adoption of what is widely considered to be a national standard, developed through consensus as part of the work of the GPTC. The proposed rule used the guidelines for determining whether a leak is a Grade 1, Grade 2, or Grade 3 and then established time frames for repair. The Commission proposed shorter times for repairing Grade 2 and Grade 3 leaks than recommended in the GPTC guide to reduce the overall number of unrepaired leaks in Texas. Data collected from annual reports filed at the Commission show that while the number of leaks repaired by operators each year grows, so also does the number of leaks scheduled for repair. Clearly, the current leakage survey frequencies and repair deadlines do not allow Texas gas distribution system operators to maintain an acceptable level of system integrity. Applying consistent standards for the grading of leaks across Texas will allow both regulators and operators to "speak the same language" when it comes to finding and fixing leaks.

As proposed, new §8.208 would have required the removal and replacement of certain compression couplings. In 2007, the Commission investigated several incidents involving compression couplings. Through these investigations, the staff concluded that there may be performance issues with certain types of compression couplings. The Commission took a significant step in October 2007 by requiring all operators that find a leaking compression coupling either to replace it or repair it by welding a protective sleeve over it. The Commission also required the replacement of mechanical couplings, identified in the process of making a leak repair, that may be susceptible to pull-out forces. While the Commission did not conclude that all compression couplings manufactured before 1980 are susceptible to pull-outs, the Commission identified certain couplings that have experienced leaks. These couplings may already be subject to a replacement program; the proposed new rule would have established a two-year deadline for the replacement of those compression couplings already identified by the operator as part of its replacement program.

Compression Couplings Survey and Directives

Beginning in April, 2007, the Commission investigated three incidents involving mechanical type compression couplings. While the leading cause of pipeline incidents in Texas is third party damage (77%), recent incidents involving compression couplings raised the Commission's level of concern. Each of the incidents involved different type couplings with different operational characteristics, yet they all involved compression-type couplings that were installed more than twenty years ago. The investigation by the Commission's Safety Division staff into the cause of these incidents resulted in a specialized review of the installation of couplings in Texas. Of specific concern is the continued safe operation of natural gas distribution systems that use compression-type couplings. In an effort to determine the scope of the issue, the Safety Division initiated a study into the use of compression couplings in natural gas distribution systems in Texas. The study involved communication by the staff with natural gas distribution operators, the National Transportation Safety Board (NTSB), the Pipeline and Hazardous Materials Safety Administration (PHMSA), as well as other state and federal safety representatives. The goal of the study was to determine the root cause or causes of these three incidents and to review the operational history of the use of couplings to allow the staff to determine the appropriate actions to resolve the issues. The results of the report were presented to the Commission in open meeting on February 12, 2008; the complete study report is posted on the Commission's web site.

During the pendency of the study, the Commission adopted two directives regarding the use of compression-type couplings. On October 9, 2007, as an interim action, the Commission issued a directive to natural gas distribution operators regarding the use of compression-type couplings. The directive required repair or replacement of all compression-type couplings installed on steel pipeline systems where leaks are found at the compression coupling. The repair would consist of a sleeve welded over the compression coupling. A second provision applied to compression couplings installed on plastic pipe. In these instances, any leak on a compression coupling involving plastic pipe would require the replacement of the compression coupling. In addition, if any compression coupling is exposed and it cannot be determined that the compression coupling was designed with two forms of resistance to pullouts, the coupling must be replaced.

On November 6, 2007, the Commission adopted a directive that addressed the removal and replacement of compression couplings at known service riser installations. The Commission required all natural gas operators to remove all compression couplings at presently known service riser installations if the couplings are not manufactured and installed with secondary restraint or are not resistant to pull outs.

As a follow up to the February 12, 2008, presentation of the results of the study on compression couplings, in open meeting on February 26, 2008, the Commission approved the items listed as part of the Path Forward in Section XII of the study report. This section contains six items dealing with the installation, removal, and maintenance of compression couplings as well as initiatives for data collection and analysis of the data collected. The Commission approved:

(1) amending the directive issued on October 9, 2007, to specifically require that all compression couplings two inches and under be ASTM (American Society for Testing and Materials) D2513 Category 1 only. The Category 1 designation replaces the description that the coupling be resistant to pullout. This change requires that any time a compression coupling is installed to join plastic pipe, it must be designated as a Category 1 type fitting. Any time a coupling is exposed, if the operator cannot confirm that the fitting is in fact a Category 1 fitting, the fitting must be replaced with a Category 1 fitting;

(2) requiring that for pipe larger than two inches, the fitting be designated as a Category 1 or a Category 3 fitting;

(3) continuing the requirement to repair or replace leaking compression couplings used to join steel pipe, and requiring that any time a coupling used to join steel pipe is exposed, if the coupling was installed prior to 1980, the fitting must also be replaced;

(4) modifying the form used in the July 2007 questionnaire that required information on failed compression couplings to require that the information be filed with the Commission as a part of the semi-annual leak repair data. This also requires a change to the proposed new Form PS-95 to capture the data specific to compression coupling model and manufacturer;

(5) conducting annual meetings with the industry to evaluate and review the leak repair reports and the annual incidents to determine if there are any trends or concerns regarding pipeline systems. The meeting will include a discussion of events within the industry, trends or characterization of the leaks repaired during the year as well as the number of leaks scheduled for repair at the end of each year. The most important portion of the meeting will be a discussion of the incidents that occurred over the prior 12 months. The discussion will include a presentation by each operator of its incidents with its findings as required as part of 49 CFR §192.617. These discussions will assist the Commission staff in determining if new rules are needed to address any problem areas or omissions in the pipeline safety regulations; and

(6) continuing to participate on the PPAHC subcommittee and follow the projects under way with the group, one of which is a survey related to repair/replacement programs throughout the country. The survey has been circulated amongst the National Association of Pipeline Safety Representatives (NAPSR) membership. The group met the first week of March 2008.

Discussion of Comments and Changes Adopted in this Rulemaking

The Commission conducted a public workshop on January 8, 2008, to discuss the rule proposal and receive comments. The 60-day comment period for the rule proposal concluded on February 5, 2008. The Commission received 13 comments on the proposal from the American Gas Association; the American Public Gas Association; Atmos Cities Steering Committee; Atmos Energy Corporation; CenterPoint Energy Arkla and CenterPoint Energy Entex; City of San Antonio-City Public Service; Continental Industries (David Jordan); CoServ Gas, Ltd.; Dresser Piping Specialties (Anthony Reese); Texas Gas Association; Texas Gas Service; West Texas Gas, Inc.; and one individual.

The American Gas Association (AGA), a national association representing 200 local natural gas utility companies, commented on four areas. First, AGA suggested that the Commission separate its regulatory actions on leakage surveys from the issue of compression couplings, citing significant differences in the motivation and proposed solutions to address the repair and replacement of mechanical couplings versus the proposed risk-based leak surveys. AGA noted that the Commission's proposed actions for couplings appear to be narrowly tailored for effective implementation by operators, while the leak survey proposal is very complicated and may be inconsistent with the long-term goals of the Department of Transportation's pipeline safety program. The Commission disagrees with this comment. The repair or replacement of mechanical couplings is a subset of a larger problem--unrepaired leaks on pipeline systems--both of which should be addressed on a comprehensive basis. If the Commission's rules prove to be incompatible with rules that may be (but have not yet been) adopted at the federal level, the Commission can initiate a rulemaking to address that issue.

Second, AGA asserted that the Commission should delay its leakage survey rule to better understand and align its regulation with the federal distribution integrity management (DIMP) regulation. While the preamble states that the Commission seeks to make its proposed rule consistent with federal DIMP regulations, AGA does not believe the proposal as written will accomplish that goal. The Commission disagrees with this comment. There is no benefit to the health, safety, and welfare of the public in Texas in waiting for action that may be (but have not yet been) taken at the federal level. The Commission is aware of some problems on some natural gas distribution systems in Texas now and is taking steps to address these issues now rather than waiting for a rulemaking at the federal level.

Third, AGA commented that the structure for the risk-based leak surveys seems overly complicated to achieve its intended results. For instance, the new grading system for Grade 2 leaks appears to have 11 to 14 criteria to analyze, as well as more record-keeping for the other classes of leaks, reclassifications requirements, mandatory repair schedules, and mandatory repeat inspections. The Commission can simplify the process by requesting that operators reduce their leak backlog inventory and letting the operator decide if the enhancements will be accomplished with additional manpower, replacement projects, or other methods. The Commission agrees in part and disagrees in part with this comment. The Commission disagrees that simply requesting that operators reduce their leak backlog inventory is sufficient regulatory action; the Commission also seeks to establish a more consistent categorization of leaks. The Commission agrees that the Grade 2 leak criteria, as proposed, were too complicated to be of practical value, and has made clarifying and simplifying changes in the adopted new §8.207.

Finally, AGA agreed with much of the regulatory approach proposed by the Commission to address mechanical couplings. The performance of couplings depends upon the design, fabrication, installation, and external factors. Operators are in the best position to assess these unique factors and resolve them with their regulators. AGA is not aware of any information showing there is a systemic problem with pre-1980 mechanical couplings. The Commission generally agrees with this statement, but also notes that as adopted, the new rules incorporate the Commission's directives, the "Path Forward" items approved February 26, 2008, and clarifying wording to aid operators in meeting the standards.

With regard to mechanical couplings, AGA expressed support for the Commission's approach to address the performance of these couplings. AGA stated that the rules should use language from the national consensus standards to the maximum extent possible, such as referring to ASTM D2513. AGA stated that the Commission should limit the application of §8.208 to known service riser installations where the mechanical coupling does not meet the requirements of ASTM D2513. The Commission agrees with this comment and has adopted new §8.208 with clarifying changes to refer to ASTM D2513 for the categories of compression couplings.

Regarding §8.208(b), AGA stated that the intent of the wording is to replace or make permanent repairs, so rather than limiting the repairs to welded sleeves, the Commission should change the language to require permanent repairs. The Commission disagrees with this comment, but had added clarifying wording to subsection (b) that limits its application to underground compres-

sion couplings used to mechanically join steel pipe. In addition, the Commission has added a new subsection (c) that provides that for any other compression coupling used to mechanically join steel pipe that is exposed during operation and maintenance activities, each operator must repair or replace the coupling unless the operator can determine that the coupling was installed after 1980.

In proposed §8.208(c) (adopted as subsection (d)), AGA commented that the Commission is correct to prohibit the repair of couplings used to join plastic. The Commission agrees with this comment, but has also added clarifying wording that limits its application to underground compression couplings used to mechanically join plastic pipe and permits removal and/or replacement of the leaking compression coupling. In addition, the Commission has adopted new paragraphs in subsection (e) (proposed as subsection (d)) that prescribe additional standards for plastic pipe. New paragraph (1) provides that, for plastic pipe two inches or less in diameter, the operator must replace or remove such coupling unless the operator can determine that the coupling is designated as an ASTM D2513 Category 1 type fitting. Paragraph (2) states that, for plastic pipe greater than two inches in diameter, the operator must replace or remove the coupling unless the operator can determine that the coupling is designated as an ASTM D2513 Category 1 or Category 3 type fitting. The Commission has deleted provisions that required each operator to determine whether the coupling is manufactured and designed to withstand pull-outs, and to replace those compression couplings used to join plastic pipe that the operator identifies as potentially susceptible to pull-outs, and has replaced that language with references to the applicable ASTM category designations.

AGA noted that the proposed rules do not present data regarding the frequency of incidents involving mechanical couplings; AGA concluded that there are millions of mechanical couplings in service lines in Texas that are operating properly, and it is rare to have a failure that results in a DOT reportable incident. AGA stated its opinion that the Commission has ordered appropriate corrective actions for this specific subset of the pipeline system. The Commission agrees that the proposed rules do not present data regarding the frequency of accidents involving mechanical couplings, and finds that this is appropriate. A rule is a statement of policy or procedure; the proposal and adoption preambles are the proper locations for providing the factual underpinnings and the explanations of policy that justify a rule. The text of adopted rule §8.208 addresses the required remedial action for compression couplings.

AGA commented that the Commission should separate the regulation for mechanical couplings from the leakage survey rules. AGA observed that the Commission acted quickly to issue a directive to operators regarding mechanical couplings and that operators have taken corrective action. The leakage survey rules are more complicated and not as narrowly tailored as the coupling rule, so a delay is warranted. AGA states that the Commission's proposed rule isolates leakage surveys from other risks and is fundamentally inconsistent with what AGA anticipates will be the framework in the federal distribution integrity management plan proposed rules to be promulgated in April 2008. AGA presented some information regarding leaks in other states to show that a risk management program focused on seeking and repairing leaks does not address the root causes. The Commission disagrees because the intent of the risk-based leak survey program is to look at different types of pipe in different locations and operating conditions to evaluate the potential for leaks or other problems that may lead to leaks. The leak survey program is a part of the Commission's development of a more comprehensive distribution integrity management program.

AGA commented that if the Commission's reason for the proposed rule was to reduce the number of leaks that have been occurring over an extended period of time, that goal can be more effectively accomplished by having the Commission inform individual operators that they need to reduce their leak inventory and letting the operator decide what methods to use. The Commission disagrees that simply requesting that operators reduce their leak backlog inventory is sufficient regulatory action. Further, the Commission finds that there is no benefit to the health, safety, and welfare of the public in Texas in waiting for action that may be (but have not yet been) taken at the federal level. The Commission is aware of some problems on some natural gas distribution systems in Texas now and is taking steps to address these issues now rather than waiting for a rulemaking at the federal level.

Regarding §8.207, AGA acknowledged the Commission's right to modify federal pipeline safety regulations to meet the specific needs of Texas citizens and operators, and also acknowledged the importance of uniformity in pipeline safety. If the Commission decides not to wait for the federal DIMP proposal, AGA suggested that the Commission align §8.207 with the leak classification and action criteria in GPTC's Guide for Gas Transmission and Distribution Piping Systems. In particular, AGA states that the daily follow-up inspection of Grade 1 leaks in proposed §8.207(b)(3) is unnecessarily stringent. The Commission agrees with this comment and has removed subsection (b)(3) from the rule as adopted.

AGA also cited the requirement in §8.207(c) for repairing and reevaluating Grade 2 leaks within six months and reevaluating on a monthly basis as being more stringent than GPTC guidelines. The requirement in §8.207(d) to repair and re-evaluate intervals of Grade 3 leaks is also more stringent than GPTC guidelines and, according to AGA, not supported by statistical data. AGA stated that this section should follow the GPTC guidelines developed by the ANSI consensus standards process. The Commission agrees in part with this comment and recognizes that the proposal might have been confusing; therefore the adopted rule requires that all Grade 2 leaks be repaired within six months. The Commission finds that pipeline safety will be enhanced by requiring repair of Grade 2 leaks within six months rather than one year. The Commission also disagrees with the lack of a deadline in the GPTC standards for repair of Grade 3 leaks. Specifically, the Commission finds that adopting the GPTC standards could create an incentive for operators to classify more leaks as Grade 3, which does not have a deadline for repair and thus does not enhance pipeline safety.

The American Public Gas Association (APGA), a national association of 700 municipally and publicly owned distribution systems, also urged the Commission to delay the adoption of rules for leak survey and repair and to wait for the federal DIMP proposal expected later in 2008. APGA stated that complying with both the federal DIMP rule and a Texas-specific rule could pose a burden for Texas gas utilities, particularly the many small, municipally owned systems. The Commission disagrees with comments urging delay in adopting its rules for leak survey and repairs, which were not developed as part of an integrity assessment and management system for distribution operators, but rather as a program to provide more direction in conducting leak

surveys and providing time frames for repairs of all leaks to reduce the growing backlog of unrepaired leaks in Texas. Further, the Commission anticipates that gas utilities will not need to comply with two different safety regulatory schemes; a gas utility that complies with the more stringent Texas rules will almost certainly be complying with any less stringent federal rules.

The Atmos Cities Steering Committee (ACSC), a coalition of more than 140 municipalities serviced by Atmos Energy Corp., Mid-Tex Division, was generally in support of the rulemaking. ACSC suggested the Commission include master-metered natural gas distribution systems as part of the rulemaking effort, whereas the proposal is strictly limited to natural gas distribution operators. ACSC asserts that master-metered systems often serve multiple customers in proximity to one another, such as an apartment complex, mobile home park, or university, thereby raising the issue of the impact on other from a leak, not unlike a densely populated central business district. The Commission disagrees with this recommended change because under 16 TAC §8.220, master meter operators are already required to conduct a leak survey every two years; if leaks are found, they are repaired at that time.

Second, ACSC questioned the Commission's limitation of the mandatory removal and replacement of compression couplings to "known" locations as specified in proposed §8.208(e) (adopted as subsection (f)). Lack of documentation by a utility is not a sufficient reason to limit the program. ACSC supports and urges the Commission to closely monitor the reporting requirements associated with the program to ensure diligent progress. ACSC further suggests that the risk-based inspection schedule developed by each utility should incorporate the identification and replacement of compression couplings other than those currently "known" to the utility. The Commission agrees in part with this comment. Based on the Commission's action at the February 26, 2008, open meeting in approving the six items from the "Path Forward" initiative, new §8.208 is adopted with changes that will increase the replacement of more compression couplings as they are found leaking, and with the more frequent leak surveys, leaking compression couplings will be found within a shorter time.

Atmos Energy Corporation (Atmos), a natural gas utility providing service to more than 1.8 million customers, suggested, similar to AGA's and APGA's comments with respect to §8.206, that the Commission delay the adoption pending the federal DOT's issuance of its integrity management rule. Atmos' rationale is based on the Commission's adoption of integrity management rules for transmission operators that was completed prior to DOT, which has resulted in additional testing for transmission pipelines in Texas. The Commission disagrees with this comment because of concerns that are specific to Texas regarding the number of unrepaired leaks and the current average length of time it takes to repair leaks. The Commission finds that the adopted rules will enhance the overall safety of pipelines in Texas and will enhance a distribution integrity management program.

Atmos suggested that, if the Commission determines to adopt a rule regarding risk based leak survey before federal action, its alternative would be a reasonable approach to such a program. The Commission agrees generally with this comment and has adopted §8.206 with the option for operators to elect either a risk-based or a prescriptive leak survey program, although the wording in the adopted rule is different from that proposed by Atmos.

Atmos also suggested a less prescriptive description of risk factors to be used in the development of such a program, commenting that because there are certain factors that must be considered along with multiple sub-factors, this is contrary to the underlying principle of integrity management. This principle recognizes that an operator has unique knowledge and experience with its own system and should be given broad latitude in developing risk and consequence factors. The Commission disagrees that the listing of multiple factors that should be considered in any way conflicts with or undermines the principles of integrity management. Further, the Commission adopts §8.206(b) with an option for operators to elect either a risk-based or a prescriptive leak survey program, and adopts §8.206(e) (proposed as subsection (f)) with changes that clarify that the minimum factors listed *should* be considered, not that they *must* be.

With respect to §8.207, Atmos agreed with the three-tiered approach to addressing leak grading (the timing of the repair, pre-repair monitoring, and post-repair monitoring) but recommended the Commission not adopt the GPTC's table in subsection (g) as part of this rulemaking to allow operators the flexibility for operator judgment in determining a leak grade. The Commission agrees that the flexibility Atmos seeks is desirable, but finds that it is already in this industry-accepted guide; the Commission disagrees with the comment to remove the table because it provides a ready reference to the factors used to determine a leak grade. However, the Commission has adopted the table with minor wording changes to make the table consistent with the rule text, and without the provision stating "a follow up leak investigation shall be conducted after the repair of each Grade 1 and Grade 2 leak to determine the effectiveness of the leak repair, as evidenced by a gas concentration reading of 0%" because post-repair inspections must be performed for all leak repairs, and the table is primarily intended to assist in the grading of leaks.

Atmos also stated that §8.207 should be clarified to provide that operator judgment is the controlling factor in categorizing a leak. For example, under the proposed rule, a leak in a gas-associated substructure with a reading of less than 80% LEL falls within the Commission's Grade 3 criteria. Depending upon the location of the leak and other site-specific factors, that leak could be a Grade 3, a Grade 2, or a Grade 1. Atmos concluded that the Commission's prescriptive parameters can lessen rather than enhance safety. The Commission disagrees with this comment. Categorizing a leak involves the application of informed judgment by experienced operators. Grade 2 leaks will necessarily be the most difficult to categorize precisely because the characteristics that define them do not fall at either extreme of the list of factors. The criteria in the rule are to be used as guidelines so that there is a somewhat more uniform classification of all leaks on all pipeline systems in Texas.

Also regarding §8.207, Atmos expressed concern with the requirement that repaired Grade 1 leaks must be monitored daily until there are three consecutive days of 0% gas readings; that repaired Grade 2 leaks must be monitored every 15 days until there are two consecutive 0% gas readings; and that Grade 3 leaks require no post-repair monitoring, regardless of any gas readings. Atmos states that there is no articulated rationale by the Commission for these time frames and monitoring requirements, nor does this approach acknowledge the fact that a repaired leak means the condition that led to the gas concentration no longer exists. The Commission agrees in part and disagrees in part with this comment. The post-repair monitoring is required to confirm that the repairs that were made did, in fact, remedy

the leak. In some instances, there could be leaks from more than one location, and repair of one leak might not have remedied all the conditions that led to the gas concentration. The Commission does agree, however, that daily follow-up is not necessary and has adopted §8.207 without the post-repair monitoring provisions proposed in subsections (b)(3) and (c)(5). In place of those provisions, the Commission has added new paragraphs (1) and (2) in subsection (e), and redesignated proposed paragraphs (1) and (2) as (3) and (4) with no changes in wording. New paragraph (1) provides that a leak is considered to be effectively repaired when an operator obtains a gas concentration reading of 0%. New paragraph (2) provides that, for a repaired leak with a gas concentration reading greater than 0% at the time of repair, an operator must conduct a post-repair leak inspection within 30 days after the repair to determine whether the leak has been effectively repaired. If the second post-repair inspection shows a gas concentration reading greater than 0%, the operator must continue conducting post-repair leak inspections every 30 days until there is a gas concentration reading of 0%. If, after six inspections have been performed, there is not a gas concentration reading of 0%, then the operator must create a new leak report with a new leak grade determination.

Regarding §8.208, Atmos concurred with the proposed rule in principle, but requested that the Commission allow approved permanent repair methods for compression couplings on steel pipelines other than the welded sleeve method specified in subsection (b). Atmos also stated that references to the ASTM standards should be used in lieu of general descriptions of secondary restraint and pull-out resistance. Atmos did not provide examples of what other repair methods might be suitable, and the Commission is unaware of any other repair method that would permanently prohibit such a coupling from leaking. The Commission agrees with the comment regarding ASTM standards in the designation of compression couplings, and based on the Commission's February 26, 2008, approval of the six items from the "Path Forward" recommendations, the Commission adopts wording in subsection (b) with clarifying changes. The Commission also adopts a new subsection (c) that further clarifies the standards applicable to compression couplings on steel pipe. This new subsection requires each operator to repair or replace any compression coupling used to mechanically join steel pipe that is exposed during operation and maintenance activities unless the operator can determine the coupling was installed after 1980.

Last, Atmos suggested the Commission include language related to the recovery of costs attributable to compliance with the rule. The Commission disagrees with this comment; there is no need to add any language regarding cost recovery to these rules. The distribution utilities have long-established accounting protocols that provide an adequate template for recording expenditures related to their safety programs. Those utilities that are subject to Commission rules comply with 16 TAC §7.310, relating to System of Accounts, and use the Federal Energy Regulatory Commission's Uniform System of Accounts for all operating and reporting purposes. These utilities are well able to determine when they may need to seek a rate increase to recover known or reasonably anticipated and measurable expenses in their pipeline safety programs. In addition, these utilities would be able to use the interim rate adjustment mechanism for recovery of invested capital, as provided in Texas Utilities Code, §104.301, and 16 TAC §7.7101, relating to Interim Rate Adjustments, for interim periods between regular rate cases.

CenterPoint Energy Arkla and CenterPoint Energy Entex ("CenterPoint"), a natural gas utility serving nearly 1.5 million customers, questioned the Commission's statement in the preamble of the proposal that the anticipated public benefit would be enhancing safety and increasing awareness of natural gas distribution systems. CenterPoint commented that most accidents are not caused by unrepaired leaks and/or compression couplings, but by third-party damage, and referred to the Commission's adopted rules in Chapter 18 of this title (relating to Underground Pipeline Damage Prevention) as proof of this statement.

The Commission agrees that third party damage is the prevailing cause of pipeline incidents in Texas. These new rules were proposed to provide a greater level of safety to the systems operating in the State of Texas, not to reduce immediately the number of accidents, but to reduce the number of leaks that remain unrepaired for extended periods of time and that can contribute to the kinds of incidents that were the impetus for the Commission's survey and study of mechanical type compression couplings.

CenterPoint agreed with other commenters recommending that the Commission delay adoption of these rules until federal rules regarding integrity management are adopted. For the reasons stated in previous paragraphs, the Commission disagrees with this comment and declines to wait for the federal rulemaking. CenterPoint also suggested that the Commission more closely follow the GPTC guide for the post-repair monitoring of leaks; the Commission agrees in part with these comments and has made clarifying changes in the adopted rule, as addressed more specifically elsewhere in this preamble.

Specifically regarding §8.206, CenterPoint asserted that the Commission's cost estimates for leak surveys are much too low. Its experience has been that the average survey rate is one to two miles per day, not per hour, especially in urban areas. CenterPoint calculated that the rule will at least double its leak survey costs to at least $5 million over the entire system. Nevertheless, CenterPoint generally supports the use of risk-based integrity management systems because they represent a more efficient and effective methodology for managing safety threats. CenterPoint cited to the fact that 90% of the reportable incidents on its system are caused by third-party damage or outside forces. CenterPoint stated that the Commission's proposed §8.206 is potentially inconsistent with upcoming federal rules because it mandates operators include at least 26 different factors as part of the risk-based program. CenterPoint uses a software program to integrate known information on its system and segments, but it does not include all of the factors listed in the rule as proposed. CenterPoint stated that the factors listed in proposed §8.206(d) and (f) should be illustrative only, not mandatory, and preferred that the sub-factors in subsection (f) be eliminated.

The Commission disagrees that subsection (f) should be eliminated (it is adopted as subsection (e)), but agrees that the wording should be amended. As adopted, subsections (d) and (e) apply to operators electing to use a risk-based leak survey program, and the factors in subsection (e) are the recommended minimum for consideration; the language has been modified to change "shall" to "should."

With regard to §8.207, CenterPoint urged the use of the GPTC guidelines instead of the Commission making changes to those guidelines as in the proposed rule. CenterPoint is unaware of any reportable incidents on its system caused by previously graded leaks and estimates that this requirement would result in an increased cost of about $1.5 million with no apparent

safety benefit. The Commission disagrees with this comment and finds that implementing a system for more uniformity in leak grading will allow Commission staff to identify trends or concerns regarding pipeline systems and to determine whether the pipeline safety regulations should be amended.

CenterPoint suggested that the Commission eliminate the two subgroups of Grade 2 leaks and require a six-month repair schedule for all Grade 2 leaks, which is more consistent with GPTC. CenterPoint also suggested that the Commission implement a more commonly used post-repair follow-up inspection procedure for Grade 1 and Grade 2 leaks, such as the GPTC one-month inspection standard for Grade 1 leaks. The Commission should not require repeated inspections once the concentration of gas in the soil reaches zero. CenterPoint also suggested that the Commission consider adopting a transition rule governing the application of the new rule to leaks pre-existing the effectiveness of the new rule. As an example, CenterPoint offered that the Commission could require that all pre-existing Grade 2 leaks must be repaired within 12 months of the effective date of the rule, and previously existing Grade 3 leaks should be reevaluated during the next scheduled survey until the leak is either cleared, repaired, or regraded. The Commission agrees in part and has changed the requirements for follow-up inspections in §8.207 as adopted without the post-repair monitoring provisions proposed in subsections (b)(3) and (c)(5). In place of those provisions, the Commission has added new paragraphs (1) and (2) in subsection (e), and redesignated proposed paragraphs (1) and (2) as (3) and (4) with no changes in wording. New paragraph (1) provides that a leak is considered to be effectively repaired when an operator obtains a gas concentration reading of 0%. New paragraph (2) provides that, for a repaired leak with a gas concentration reading greater than 0% at the time of repair, an operator must conduct a post-repair leak inspection within 30 days after the repair to determine whether the leak has been effectively repaired. If the second post-repair inspection shows a gas concentration reading greater than 0%, the operator must continue conducting post-repair leak inspections every 30 days until there is a gas concentration reading of 0%. If, after six inspections have been performed, there is not a gas concentration reading of 0%, then the operator must create a new leak report with a new leak grade determination.

CenterPoint requested clarification in §8.208, which includes the two 2007 Commission directives on the removal and replacement of compression couplings. CenterPoint noted that compression couplings, whether at the service riser or elsewhere, have not proved to be a significant threat on CenterPoint's system, and clarified that CenterPoint did not use any of the couplings that appear to be the focus of the new rules. CenterPoint stated that the Commission should clarify the rules to clearly distinguish among the three replacement programs, to better define the term "known service riser installation," and to refer to a recognized industry standard for thermoplastic couplings. CenterPoint is unaware of couplings that are manufactured with multiple restraint components, and requests that the term "known service riser installations" be better defined. The Commission agrees in part with these comments and has incorporated into adopted §8.208(e) (proposed as subsection (d)) and §8.208(f) the clarifying changes that the Commission adopted on February 26, 2008, with respect to the standards for couplings. The Commission also adopts §8.208 with clarifying changes in subsection (g) to provide a date certain for compliance (November 30, 2009) and in subsection (j) for filing progress reports.

CenterPoint also suggested that the Commission specify in the rule "the accounts to which LDCs should book the costs associated with the program." CenterPoint submitted that these costs should be considered capital costs since compression couplings are an integral part of the distribution plant of a gas utility, and requested that the Commission add a new subsection to §8.208 to read: "The costs incurred by a gas utility in complying with replacement or removal of compression couplings as required by this section shall be recorded into the appropriate distribution or transmission plant accounts according to the applicable system of accounts proscribed by the Commission." CenterPoint asserted that this wording would prevent any confusion over the treatment of the costs on a utility's books and insure that they are accurately treated for rate purposes. The Commission disagrees with this comment. As stated with respect to other similar comments, there is no need to add any language regarding cost recovery to these rules. The distribution utilities have long-established accounting protocols that provide an adequate template for recording expenditures related to their safety programs. Those utilities that are subject to Commission rules comply with 16 TAC §7.310, relating to System of Accounts, and use the Federal Energy Regulatory Commission's Uniform System of Accounts for all operating and reporting purposes. These utilities are well able to determine when they may need to seek a rate increase to recover known or reasonably anticipated and measurable expenses in their pipeline safety programs. In addition, these utilities would be able to use the interim rate adjustment mechanism for recovery of invested capital, as provided in Texas Utilities Code, §104.301, and 16 TAC §7.7101, relating to Interim Rate Adjustments, for interim periods between regular rate cases.

In general, CenterPoint stated, only 4.3% of its total underground leaks from November 2006 to October 2007 occurred from compression couplings. CenterPoint submitted that the costs for the removal and replacement program are significantly higher than stated in the proposal preamble. CenterPoint suggested that the Commission incorporate the ASTM D2513 industry standard in defining the type of couplings that must be removed and those that are otherwise acceptable, and that the Commission consider allowing other types of repairs of leaking steel couplings (such as encapsulation, which involves the application of polyurethane around the coupling, sealing both ends) instead of permitting only the use of a welded sleeve. The Commission agrees in part with this comment and has incorporated references to ASTM D2513 to clarify the required standard. The Commission disagrees, however, with permitting other types of repairs because the welded sleeve has proved to be a reliable remedy, and the Commission is unaware that other types of repair methods have been shown to be as reliable.

City Public Service of San Antonio (CPS), a municipal board of the City of San Antonio serving over 319,000 customers, commented, with respect to §8.206(b), that there is no evidence to suggest that current leak survey intervals are inadequate or have contributed to unsafe conditions. CPS asserted that leak survey costs resulting from this rule will increase substantially, estimating its own increase to be up to 40% of its current costs. CPS suggested allowing operators one-year, instead of the proposed six months, to develop a risk-based leak inspection program. Operators will need to update their operation and maintenance plans, other records and schedules, operator qualification programs, and other similar changes. The Commission disagrees with this suggestion and adopts §8.206(b) with a compliance deadline of six months as proposed. The Commission finds that

this is reasonable, because by virtue of adopting the new rules with a September 1, 2008, effective date, operators will have an additional three months--for a total of nine--to develop their risk based leak inspection programs.

CPS also referred to the federal DIMP regulations and urged the Commission to delay adoption of its rules. As previously noted in the preamble, the Commission disagrees with any delay in adoption of these rules based on potential federal action.

In the alternative, CPS recommended that each gas distribution system operator update its risk-based leak inspection program every three years rather than the proposed rule wording stating within 30 days of a new segment being put into operation or a 10% increase in the number of unrepaired leaks. The Commission disagrees with this comment. The proposed rule already required an update every three years; the two exceptions were the addition of a new segment or an increase of 10% in the number of unrepaired leaks. In the event of a new segment of pipeline becoming operational, the new segment would need to be included in the routine survey plan, which, for operational efficiencies, might mean that it would be surveyed sooner than the third anniversary of its going into service. In the second event, an increase in the number of unrepaired leaks likely indicates there is a problem that needs more frequent attention.

With respect to proposed §8.206(f) (adopted as subsection (e)), CPS stated that the wording should be revised so that operators *may* consider a number of factors, such as those listed in subsection (f)(1) - (5), not that they *shall* consider all of those. The Commission agrees with these suggestions and, in addition to other changes in §8.206, has made changes in subsection (e) by replacing the word "shall" with "should," which will provide operators electing a risk-based leak survey program some flexibility in applying the rule.

Regarding §8.207, CPS asserted that the proposed leak grading and repair requirements would impose increased costs on operators, estimating that its costs would increase 89% to implement these provisions. CPS stated that there are no data to support the need for some of these procedures (for example, return trips after a Grade 1 leak has cleared and reads zero for three consecutive days is unnecessary and costly), and recommended that follow-up investigations be conducted within 30 days as allowed in the GPTC guidelines. For a Grade 2 leak, CPS recommended requiring repair within six months or sooner based on the operator's judgment. The Commission agrees in part and has changed the requirements for follow-up inspections in §8.207 as adopted, as explained in prior paragraphs in this preamble.

An individual commented regarding the wording in proposed §8.208(e) (adopted as subsection (f)), which says "Each operator must remove and replace all compression couplings at currently known service riser installations, identifiable by a meter number or street address, if they are not both: (1) manufactured and installed with secondary restraint; and (2) resistant to pull-outs." The commenter stated that this language differs from the November 2, 2007, directive from the Commission which requires "gas utility companies to seek out all known compression couplings and replace them immediately at known service riser installations if the couplings are not manufactured and installed with secondary restraint or are not resistant to pull-outs." The commenter asked for clarification on what is meant by "two forms" (of resistance to pull-outs, proposed in the first sentence of subsection (e)) and "secondary restraint." The Commission agrees that this wording should be clarified and has adopted this provision with references to ASTM D2513 to clarify the expected standard.

The Commission received two similar comments regarding the wording in §8.208(c), (d), and (e) (adopted as subsections (d), (e), and (f)). One individual had attended the January 8, 2008, workshop on the rule proposals, and agreed with the discussion there to change the wording in proposed subsections (d) and (e) (adopted as subsections (e) and (f)) to refer to Category 1 fittings as described by ASTM D2513. Another individual suggested that reference to 49 CFR Part 192, and specifically to §192.283(b), regarding procedures for installing proper joints, should be added to specify which couplings are accepted for use. The Commission agrees with comments regarding ASTM D2513 and has added that reference to §8.208(e) (in new paragraphs (1) and (2)), (f), and (h), and has added references to 49 CFR §192.283(b) and §192.273 in new subsection (i).

The Texas Gas Association (TGA), a statewide association of 90 natural gas distribution and transmission companies in Texas, expressed support for the Commission's efforts to increase the safety of workers around pipelines, as well as the general public, and commended the Commissions Pipeline Safety Division staff for the even-handed development of a difficult rule and for listening to the comments of various natural gas utilities. TGA offered wording changes which it said will protect the citizens of Texas in the most economical manner. CoServ Gas, Ltd. (CoServ), a local distribution company serving 59,000 customers, is a member of TGA and served on the TGA committee charged with reviewing and commenting on these rules. CoServ supported TGA's comments as submitted, and offered the identical wording changes. While TGA included specific suggestions for rule wording changes, it offered no explanation of why it supported the particular changes.

Specifically, TGA recommended changing the title of §8.206 from "Risk-Based Leak Inspection Program" to "Risk-Based Leak Survey Program." The Commission agrees with this recommendation and has made the change in the adopted rule.

TGA also recommended adding a prescriptive option in §8.206(b) for compliance with the risk-based leak survey similar to what the Commission adopted as part of the integrity management rule (in §8.101 of this title, relating to Pipeline Integrity Assessment and Management Plans for Natural Gas and Hazardous Liquids Pipelines). The Commission agrees with this suggestion and has made this recommended change because this approach has worked well for the pipeline integrity management program.

TGA recommended removing many of the provisions of the Gas Piping Technology Committee's (GPTC) guide proposed as part of §8.207.

The Commission does not agree with this comment because the rule as proposed provides sufficient flexibility for operators to use their expertise and judgment in determining a leak grade. In addition, the table provides a ready reference to the factors used to determine a leak grade. However, the Commission has adopted the table with minor wording changes to make the table consistent with the rule text, and without the provision stating "a follow up leak investigation shall be conducted after the repair of each Grade 1 and Grade 2 leak to determine the effectiveness of the leak repair, as evidenced by a gas concentration reading of 0%" because post-repair inspections must be performed for all leak repairs, and the table is primarily intended to assist in the grading of leaks.

TGA also requested that the Commission adopt a time frame for complying with the rules for those leaks identified prior to the adoption of the rules. The Commission agrees with this comment and has specified both an effective date and deadlines for compliance that are somewhat longer than initially proposed. The Commission adopts new language in §8.207(a) that establishes a deadline of six months of March 1, 2009, to repair Grade 2 Leaks, and of September 1, 2011, to repair Grade 3 leaks.

With respect to §8.208(e), TGA recommended that both ASTM Category 1 and Category 3 type compression couplings be accepted. Based on the Commission's approval of the six items from the "Path Forward" recommendations on February 26, 2008, only Category 1 will be accepted for pipe that is two inches or less in diameter, but both Category 1 and Category 3 are approved for pipe that is greater than two inches in diameter. As adopted, new §8.208 includes references to ASTM D2513 in subsections (e), (f), and (h).

Texas Gas Service (TGS), a natural gas utility operating in Texas, supports the concepts in the proposed new rules. With regard to §8.206, TGA also urged the Commission to wait until the federal DIMP regulations are promulgated; however, if the Commission goes forward with adoption of its rules, TGA supports the comments submitted by TGA, for all three proposed new rules. For the reasons set forth in response to other similar comments, urging the Commission to delay adoption of these proposed rules, the Commission disagrees with these comments.

With respect to §8.208, TGS recommended that the Commission clarify that the adopted rule replaces the directives issued by the Commission in 2007 concerning the removal and replacement of compression couplings. The Commission adopts new §8.208 with specific provisions that clarify and supersede the Commission's earlier directives regarding removal and replacement of compression couplings. Compliance with these rules will constitute compliance with the directives.

West Texas Gas, Inc. (WTG), a natural gas utility providing gas service to more than 21,000 customers, commented that the proposed rules will impose a greater cost to WTG and its employees as the rules for Texas will be different from those in the other states in which WTG operates. WTG also stated that the Commission's estimate for the costs to comply with §8.206 may be understated because the Commission has not promulgated a specific model or format. WTG does not have in-house personnel to conduct the surveys, and estimated that its costs to hire an outside party will be much greater than what was estimated. The Commission disagrees with this comment because of concerns that are specific to Texas regarding the number of unrepaired leaks and the current average length of time it takes to repair leaks. The Commission recognizes that its pipeline safety regulations are different, and often more stringent, from those in place in other states and at the federal level. The Commission proposed these rules to provide a greater level of safety to the systems operating in the State of Texas, not to reduce immediately the number of accidents, but to reduce the number of leaks that remain unrepaired for extended periods of time and that can contribute to the kinds of incidents that were the impetus for the Commission's survey and study of mechanical type compression couplings. Further, the Commission wants uniform safety practices for utilities operating in Texas. The Commission finds that the adopted rules will enhance the overall safety of pipelines in Texas and will enhance a distribution integrity management program.

Regarding §8.206(b), WTG asked what happens after an operator submits a risk-based determination of leak survey frequency to the Commission, *i.e.*, whether the Commission must officially accept it or reject it. WTG stated that every operator will submit the plans on the same day and, unless an extension of time is granted, the Commission will be flooded with submittals. WTG suggested that some wording be added to the rule to explain what happens after the six-month deadline and perhaps to allow nine months for some small operators. The Commission agrees with this comment in part and, based on the September 1, 2008, effective date, finds that operators will effectively have nine months to develop and file their plans. In addition, the Commission has added language to §8.206(b) that clarifies the process following an operator's submission of its leak survey program plan.

Regarding §8.206(d)(1), WTG suggests that "new system" or "segment" needs to be better defined or some language added to identify a materiality threshold so that a reevaluation is not required every time a short pipeline lateral is installed. With respect to §8.206(d)(2), WTG pointed out how this would affect a system or segment that had reported zero leaks in previous surveys and then located a single leak regardless of severity in a current survey to demonstrate that the smaller a system, the more unrealistic a 10% threshold is. The Commission disagrees with this comment because leaks that occur suddenly are precisely what the Commission wants operators to pay attention to; such leaks can be an early indication of a more serious problem.

WTG recommended that §8.207 should stipulate that it applies to leaks discovered on "distribution" systems after the effective date of the rule, and that §8.207(b)(3) should state that immediate investigation of the leak repair is prudent, but the requirement to continue to probe the leak repair for three consecutive days after reaching a 0% reading is excessive and unnecessary. The Commission agrees with this comment and has amended the post-repair monitoring requirements as explained in prior paragraphs in this preamble.

Last, WTG commented that §8.208(e) and (f) are vague; the wording should apply only to couplings used on plastic pipe and only for those *known service riser* couplings *known* not to be designed with two forms of pull-out resistance. The Commission agrees with this comment and in the adopted rule has stated the requirements separately for each type of pipe and added references to the required ASTM D2513 standard.

Summary of Adopted Rules

The Commission adopts new §8.206 with a new title, "Risk-Based Leak Survey Program." New subsection (a) expressly states an effective date of September 1, 2008, for each operator of a gas distribution system that is subject to the requirements of 49 CFR Part 192.

New §8.206(b) provides that no later than March 1, 2009, each operator shall have completed and submitted to the Commission either a prescriptive or a risk-based program for leak surveys for its pipeline systems that complies with the requirements of this section. Such program requires a designation on a system by system basis or by segments within each system whether the operator has chosen to use the risk based leak survey program that complies with the requirements of subsections (c) through (f) of this section or the prescriptive leak survey program that complies with the requirements of subsection (g) of this section. Within 185 days after receipt of notice that an operator's plan is complete, the Commission will either notify the operator of the

acceptance of the plan or will complete an evaluation of the plan to determine compliance with this section.

New §8.206(c) requires each operator to create a risk model on which to base its leak survey program to identify those systems or segments within systems that pose the greatest hazard and thus will be inspected for leaks more frequently. The risk model must identify risk factors and determine the degree of hazard associated with those risk factors. The operator must establish the leak survey frequency based on the degree of hazard for each system or segment within a system.

New §8.206(d) requires each operator periodically to re-evaluate each pipeline system or system segment and update its leak survey inspection program to address any changes that may be identified through the monitoring of the pipeline system in accordance with the requirements imposed by 49 CFR §192.613 (relating to Continuing Surveillance). Each operator must review its leak survey inspection program at least every three years and within 30 days of adding a new system or segment being put into operation or if, for any system or segment, there has been a ten percent increase in the number of leaks being upgraded or a ten percent increase in the number of unrepaired leaks.

New §8.206(e) states that, based on the particular circumstances and conditions, an increased frequency beyond that required by 49 CFR §192.723(b)(1) and (2) may be warranted. Surveys should be conducted more frequently in those areas with the greatest potential for leakage and where leakage could be expected to create a hazard. Each operator should consider the following factors in establishing an increased frequency of leakage surveys:

(1) pipe location, which means proximity to buildings or other structures and the type and use of the buildings and proximity to areas of concentrations of people;

(2) composition and nature of the piping system, which means the age of the pipe, materials, type of facilities, operating pressures, leak history records, and other studies;

(3) the corrosion history of the pipeline, which means known areas of significant corrosion or areas where corrosive environments are known to exist, cased crossings of roads, highways, railroads, or other similar locations where there is susceptibility to unique corrosive conditions;

(4) environmental factors that affect gas migration, which means conditions that could increase the potential for leakage or cause leaking gas to migrate to an area where it could create a hazard, such as extreme weather conditions or events (significant amounts or extended periods of rainfall, extended periods of drought, unusual or prolonged freezing weather, hurricanes, etc.), particular soil conditions, unstable soil or areas subject to earth movement, subsidence, or extensive growth of tree roots around pipeline facilities that can exert substantial longitudinal force on the pipe and nearby joints; and

(5) any other condition known to the operator that has significant potential to initiate a leak or to permit leaking gas to migrate to an area where it could result in a hazard, which could include construction activity near the pipeline, wall-to-wall pavement, trenchless excavation activities (e.g., boring), blasting, large earth-moving equipment, heavy traffic, increase in operating pressure, and other similar activities or conditions.

New §8.206(f) provides that the assignment of inspection priorities is based on the degree of hazard associated with the risk factors assigned to the pipeline system or segments within a system. The determination of leak survey frequency is determined by classifying each pipeline segment based on its degree of hazard associated with each risk factor. Each operator must establish its own risk ranking for pipeline segments to determine the frequency of leakage surveys. Based on a ranking from high to low, each operator must schedule leak inspections for a given pipeline system or segment within a system on a time interval necessary to address the risks. The time interval may range from quarterly to every five years.

New §8.206(g) requires that operators electing to use a prescriptive leak survey program must conduct leak surveys no less frequently than annually for all systems within a business district; every five years for non-business district polyethylene systems or segments within a system; every three years for all other non-business district cathodically protected steel systems or segments within a system; and every two years for all other non-business district systems or segments within a system.

The Commission adopts new §8.207, relating to Leak Grading and Repair, with an express statement of scope in subsection (a). Operators have until March 1, 2009, to repair Grade 2 leaks identified prior to September 1, 2008, and until September 1, 2011, to repair Grade 3 leaks identified prior to September 1, 2008. For all leaks reported on or after September 1, 2008, operators must comply with the requirements of new §8.207.

New §8.207(a)(1) declares that the purpose of the leak grading system is to determine the degree or extent of the potential hazard resulting from gas leakage and to prescribe remedial actions. Each operator must promptly respond to any notification of a gas leak or gas odor or any notification of damage to facilities by excavators or other outside sources.

New §8.207(a)(2) requires each operator to ensure that leak grading is made only by those individuals who possess training, experience, and knowledge in the field of leak classification and investigation, including extensive association with actual leakage work. The judgment of these individuals, based upon all pertinent information and a complete leakage investigation at the scene, must form the basis for the leak grade determination. Each operator must ensure that its leak detection equipment is properly calibrated.

New §8.207(b)(1) defines Grade 1 leaks. A Grade 1 leak is an existing or probable hazard to persons or property and requires the operator to take action immediately to eliminate the hazard and make repairs. A Grade 1 leak includes but is not limited to:

(1) any leak which, in the judgment of operating personnel at the scene, is regarded as an immediate hazard;

(2) escaping gas that has ignited;

(3) any indication of gas, which has migrated into or under a building, or into a tunnel;

(4) any reading at the outside wall of a building, or where gas would likely migrate to an outside wall of a building;

(5) any reading of 80% lower explosive limit (LEL) or greater in a confined space;

(6) any reading of 80% LEL or greater in small substructures, other than gas associated substructures, from which gas would likely migrate to the outside wall of a building; or

(7) any leak that can be seen, heard, or felt, and which is in a location that may endanger the general public or property.

New §8.207(b)(2) requires operators to take prompt action to eliminate the hazardous conditions with respect to a Grade 1 leak. The prompt action may require one or more of the following actions: implementing an emergency plan (49 CFR §192.615); evacuating premises; blocking off an area; rerouting traffic; eliminating sources of ignition; venting the area by removing manhole covers, barholing, installing vent holes, or other means; stopping the flow of gas by closing valves or other means; or notifying emergency responders.

New §8.207(c) pertains to Grade 2 leaks. A Grade 2 leak is non-hazardous at the time of detection, but requires the operator to schedule repair based on probable future hazard. A Grade 2 leak, because of its location and magnitude, can be scheduled for repair on a normal routine basis with periodic reinspection as necessary. Operators must re-evaluate every Grade 2 leak at least once every 30 days until the leak is repaired or cleared.

New §8.207(c)(2) requires operators to repair within six months of detection any leak:

(1) with a reading of 40% LEL, or greater, under a sidewalk in a wall-to-wall paved area that does not qualify as a Grade 1 leak;

(2) with a reading of 100% LEL, or greater, under a street in a wall-to-wall paved area that has significant gas migration and does not qualify as a Grade 1 Leak;

(3) with a reading less than 80% LEL in small substructures (other than gas associated substructures) from which gas would likely migrate creating a probable future hazard;

(4) with a reading between 20% LEL and 80% LEL in a confined space;

(5) with a reading on a pipeline operating at 30 percent SMYS, or greater, in a class 3 or 4 location, which does not qualify as a Grade 1 leak;

(6) with a reading of 80% LEL, or greater, in gas associated substructures; and

(7) which, in the judgment of operating personnel at the scene, is of sufficient magnitude to justify scheduled repair.

New §8.207(c)(3) states that Grade 2 leaks vary greatly in degree of potential hazard. Some Grade 2 leaks, when evaluated by the criteria in this subsection, may require a scheduled repair within the next five working days. Others will require repair within 30 days. In determining the repair priority, each operator shall consider criteria such as the amount and migration of gas; the proximity of gas to buildings and subsurface structures; the extent of pavement; and soil type and conditions, such as frost cap, moisture, and natural venting.

New §8.207(c)(4) requires operators to take action ahead of ground freezing or other adverse changes in venting conditions with respect to any leak which, under frozen or other adverse soil conditions, would likely allow gas to migrate to the outside wall of a building.

New §8.207(d) pertains to Grade 3 leaks. A Grade 3 leak is non-hazardous at the time of detection and can be reasonably expected to remain non-hazardous. Operators must repair a Grade 3 leak within 36 months of detection.

New §8.207(d)(2) requires operators to re-evaluate each Grade 3 leak during the next scheduled survey, or within 15 months of date reported, whichever occurs first, until the leak is either cleared, repaired or re-graded. A leak requiring re-evaluation at periodic intervals includes any reading of less than 80% LEL in small, gas-associated substructures; under a street in areas without wall-to-wall paving where it is unlikely the gas could migrate to the outside wall of a building; and of less than 20% LEL in a confined space.

New §8.207(e) concerns post-repair inspections. Paragraph (1) provides that a leak is considered to be effectively repaired when an operator obtains a gas concentration reading of 0%. Paragraph (2) provides that, for a repaired leak with a gas concentration reading greater than 0% at the time of repair, an operator must conduct a post-repair leak inspection within 30 days after the repair to determine whether the leak has been effectively repaired. If the second post-repair inspection shows a gas concentration reading greater than 0%, the operator must continue conducting post-repair leak inspections every 30 days until there is a gas concentration reading of 0%. If after six inspections have been performed the operator is unable to obtain a gas concentration reading of 0%, then the operator must create a new leak report with a new leak grade determination.

New §8.207(e)(3) provides that post-repair inspections are not required for leak repairs completed by the replacement or insertion of an entire length of pipe or service line, or for the repair of leakage caused by excavator or third-party damage, provided a complete re-evaluation of the leak area after completion of repairs verifies that no further indications of leakage exist.

New §8.207(e)(4) provides that remedial measures such as lubrication of valves or tightening of packing nuts on valves which seal leaks are considered to be routine maintenance work and do not require a post-repair inspection.

New §8.207(f) relates to upgrading. When an operator upgrades a leak to a higher grade, the time period for repair is the remaining time based on its original classification or the time allowed for repair under its new grade, whichever is less. This requirement does not apply to leaks that, at the time of discovery, an operator has classified at a lower grade pending a further, more complete investigation of the leak hazard area.

New §8.207(g) contains the table that provides a concise reference for leak grading and leak repair deadlines.

The Commission adopts new §8.208, which pertains to the mandatory removal and replacement program. New subsection (a) provides an express effective date of September 1, 2008, for each operator of a gas distribution system that is subject to the requirements of 49 CFR Part 192.

New §8.208(b) provides that for leaks identified on any underground compression coupling used to mechanically join steel pipe, operators must either replace the leaking compression coupling or repair it using a sleeve welded over the compression coupling.

New §8.208(c) requires operators to repair or replace any compression coupling used to mechanically join steel pipe that is exposed during operation and maintenance activities unless the operator can determine the coupling was installed after 1980.

New §8.208(d) provides that for leaks identified on any underground compression coupling used to mechanically join plastic pipe, operators must remove and/or replace the leaking compression coupling.

New §8.208(e) requires that for any other compression coupling used to join plastic pipe that is exposed during operation and maintenance activities, for plastic pipe two inches or less in diameter, operators must replace or remove such coupling unless

the operator can determine that the coupling is designated as an ASTM D2513 Category 1 type fitting. For plastic pipe greater than two inches in diameter, operators must replace or remove such coupling unless the operator can determine that the coupling is designated as an ASTM D2513 Category 1 or Category 3 type fitting.

New §8.208(f) states that each operator must remove and replace all compression couplings at currently known service riser installations, identifiable by a meter number or a street address, if they are not manufactured and installed in accordance with ASTM D2513 for Category 1 fittings.

New §8.208(g) requires operators to complete the removal and replacement of such compression couplings by November 30, 2009.

New §8.208(h) requires that any coupling installed on plastic pipe after September 1, 2008, be designed to meet the requirements of ASTM D2513 Category 1.

New §8.208(i) requires that any coupling installed on steel pipe after September 1, 2008, be designed to meet the requirements of 49 CFR Part 192, §192.273.

New §8.208(j) provides that, beginning November 1, 2008, and every six months thereafter until all compression couplings on the operator's system subject to subsection (f) of this section have been removed and replaced, each operator must file with the Safety Division a progress report showing the number of service riser installations checked, the condition of the coupling, and the total number of compression couplings replaced for that reporting period.

The Commission adopts the new rules under Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all common carrier pipelines in Texas, persons owning or operating pipelines in Texas, and their pipelines and oil and gas wells, and authorize the Commission to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission as set forth in §81.051, including such rules as the Commission may consider necessary and appropriate to implement state responsibility under any federal law or rules governing such persons and their operations; Texas Utilities Code, §§121.201 - 121.210, which authorize the Commission to adopt safety standards and practices applicable to the transportation of gas and to associated pipeline facilities within Texas to the maximum degree permissible under, and to take any other requisite action in accordance with, 49 United States Code Annotated, §§60101, *et seq*.; and 49 CFR Part 192, which establishes minimum safety standards for the transportation of natural and other gas by pipeline.

Texas Natural Resources Code, §81.051 and §81.052; Texas Utilities Code, §§121.201 - 121.211; 49 United States Code Annotated, §§60101, *et seq*.; and 49 CFR part 192 are affected by the adopted new rules.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052; Texas Utilities Code, §§121.201 - 121.211; and 49 United States Code Annotated, §§60101, *et seq*.

Cross-reference to statute: Texas Natural Resources Code, Chapter 81; Texas Utilities Code, Chapter 121; and 49 United States Code Annotated, Chapter 601.

Issued in Austin, Texas, on May 29, 2008.

§8.206. Risk-Based Leak Survey Program.

(a) Effective September 1, 2008, this section applies to each operator of a gas distribution system that is subject to the requirements of 49 CFR Part 192.

(b) No later than March 1, 2009, each operator shall have completed and submitted to the Commission either a prescriptive or a risk-based program for leak surveys for its pipeline systems that complies with the requirements of this section. Such program shall require a designation on a system by system basis or by segments within each system whether the operator has chosen to use the risk based leak survey program that complies with the requirements of subsections (c) through (f) of this section or the prescriptive leak survey program that complies with the requirements of subsection (g) of this section. Within 185 days after receipt of notice that an operator's plan is complete, the Commission shall either notify the operator of the acceptance of the plan or shall complete an evaluation of the plan to determine compliance with this section.

(c) Each operator shall create a risk model on which to base its leak survey program to identify those systems or segments within systems that pose the greatest hazard and thus will be inspected for leaks more frequently. The risk model shall identify risk factors and determine the degree of hazard associated with those risk factors. The operator shall establish the leak survey frequency based on the degree of hazard for each system or segment within a system.

(d) Each operator shall periodically re-evaluate each pipeline system or system segment and update its leak survey inspection program to address any changes that may be identified through the monitoring of the pipeline system in accordance with the requirements imposed by 49 CFR §192.613 (relating to Continuing Surveillance). Each operator shall review its leak survey inspection program at least every three years and within 30 days in the following circumstances:

(1) to add a new system or segment being put into operation; or

(2) if, for any system or segment, there has been a ten percent increase in the number of leaks being upgraded or a ten percent increase in the number of unrepaired leaks.

(e) Based on the particular circumstances and conditions, an increased frequency beyond that required by 49 CFR §192.723(b)(1) and (2), may be warranted. Surveys should be conducted more frequently in those areas with the greatest potential for leakage and where leakage could be expected to create a hazard. Each operator should consider the following factors in establishing an increased frequency of leakage surveys:

(1) pipe location, which means proximity to buildings or other structures and the type and use of the buildings and proximity to areas of concentrations of people;

(2) composition and nature of the piping system, which means the age of the pipe, materials, type of facilities, operating pressures, leak history records, and other studies;

(3) the corrosion history of the pipeline, which means known areas of significant corrosion or areas where corrosive environments are known to exist, cased crossings of roads, highways, railroads, or other similar locations where there is susceptibility to unique corrosive conditions;

(4) environmental factors that affect gas migration, which means conditions that could increase the potential for leakage or cause leaking gas to migrate to an area where it could create a hazard, such as extreme weather conditions or events (significant amounts or extended periods of rainfall, extended periods of drought, unusual or prolonged freezing weather, hurricanes, etc.), particular soil conditions, unsta-

ble soil or areas subject to earth movement, subsidence, or extensive growth of tree roots around pipeline facilities that can exert substantial longitudinal force on the pipe and nearby joints; and

(5) any other condition known to the operator that has significant potential to initiate a leak or to permit leaking gas to migrate to an area where it could result in a hazard, which could include construction activity near the pipeline, wall-to-wall pavement, trenchless excavation activities (e.g., boring), blasting, large earth-moving equipment, heavy traffic, increase in operating pressure, and other similar activities or conditions.

(f) The assignment of inspection priorities is based on the degree of hazard associated with the risk factors assigned to the pipeline system or segments within a system. The determination of leak survey frequency is determined by classifying each pipeline segment based on its degree of hazard associated with each risk factor. Each operator shall establish its own risk ranking for pipeline segments to determine the frequency of leakage surveys. Based on a ranking from high to low, each operator shall schedule leak inspections for a given pipeline system or segment within a system on a time interval necessary to address the risks. The time interval may range from quarterly to every five years.

(g) Operators electing to use a prescriptive leak survey program shall conduct leak surveys no less frequently than:

(1) annually for all systems within a business district;

(2) every five years for non-business district polyethylene systems or segments within a system;

(3) every three years for all other non-business district cathodically protected steel systems or segments within a system; and

(4) every two years for all other non-business district systems or segments within a system.

§8.207. Leak Grading and Repair.

(a) Purpose and qualifications. Operators shall have until March 1, 2009, to repair Grade 2 leaks identified prior to September 1, 2008, and shall have until September 1, 2011, to repair Grade 3 leaks identified prior to September 1, 2008. For all leaks reported on or after September 1, 2008, operators shall comply with the requirements of this section.

(1) The purpose of the leak grading system is to determine the degree or extent of the potential hazard resulting from gas leakage and to prescribe remedial actions. Each operator shall promptly respond to any notification of a gas leak or gas odor or any notification of damage to facilities by excavators or other outside sources.

(2) Each operator shall ensure that leak grading is made only by those individuals who possess training, experience, and knowledge in the field of leak classification and investigation, including extensive association with actual leakage work. The judgment of these individuals, based upon all pertinent information and a complete leakage investigation at the scene, shall form the basis for the leak grade determination. Each operator shall ensure that its leak detection equipment is properly calibrated.

(b) Grade 1 leaks.

(1) A Grade 1 leak is an existing or probable hazard to persons or property and requires the operator to take action immediately to eliminate the hazard and make repairs. A Grade 1 leak includes but is not limited to:

(A) any leak which, in the judgment of operating personnel at the scene, is regarded as an immediate hazard;

(B) escaping gas that has ignited;

(C) any indication of gas, which has migrated into or under a building, or into a tunnel;

(D) any reading at the outside wall of a building, or where gas would likely migrate to an outside wall of a building;

(E) any reading of 80% lower explosive limit (LEL) or greater in a confined space;

(F) any reading of 80% LEL or greater in small substructures, other than gas associated substructures, from which gas would likely migrate to the outside wall of a building; or

(G) any leak that can be seen, heard, or felt, and which is in a location that may endanger the general public or property.

(2) A Grade 1 leak requires that the operator take prompt action to eliminate the hazardous conditions. The prompt action may require one or more of the following:

(A) implementing an emergency plan (49 CFR §192.615);

(B) evacuating premises;

(C) blocking off an area;

(D) rerouting traffic;

(E) eliminating sources of ignition;

(F) venting the area by removing manhole covers, barholing, installing vent holes, or other means;

(G) stopping the flow of gas by closing valves or other means; or

(H) notifying emergency responders.

(c) Grade 2 leaks.

(1) A Grade 2 leak is non-hazardous at the time of detection, but requires the operator to schedule repair based on probable future hazard. A Grade 2 leak, because of its location and magnitude, can be scheduled for repair on a normal routine basis with periodic reinspection as necessary. Each operator shall re-evaluate every Grade 2 leak at least once every 30 days until repaired or cleared.

(2) Each operator shall repair within six months of detection any leak:

(A) with a reading of 40% LEL, or greater, under a sidewalk in a wall-to-wall paved area that does not qualify as a Grade 1 leak;

(B) with a reading of 100% LEL, or greater, under a street in a wall-to-wall paved area that has significant gas migration and does not qualify as a Grade 1 Leak;

(C) with a reading less than 80% LEL in small substructures (other than gas associated substructures) from which gas would likely migrate creating a probable future hazard;

(D) with a reading between 20% LEL and 80% LEL in a confined space;

(E) with a reading on a pipeline operating at 30 percent SMYS, or greater, in a class 3 or 4 location, which does not qualify as a Grade 1 leak;

(F) with a reading of 80% LEL, or greater, in gas associated substructures; and

(G) which, in the judgment of operating personnel at the scene, is of sufficient magnitude to justify scheduled repair.

(3) Grade 2 leaks vary greatly in degree of potential hazard. Some Grade 2 leaks, when evaluated by the criteria in this subsection, may require a scheduled repair within the next five working days. Others will require repair within 30 days. In determining the repair priority, each operator shall consider criteria such as the following:

(A) the amount and migration of gas;

(B) the proximity of gas to buildings and subsurface structures;

(C) the extent of pavement; and

(D) soil type and conditions, such as frost cap, moisture, and natural venting.

(4) Each operator shall take action ahead of ground freezing or other adverse changes in venting conditions with respect to any leak which, under frozen or other adverse soil conditions, would likely allow gas to migrate to the outside wall of a building.

(d) Grade 3 leaks.

(1) A Grade 3 leak is non-hazardous at the time of detection and reasonably can be expected to remain non-hazardous. Each operator shall repair a Grade 3 leak within 36 months of detection.

(2) Each operator shall re-evaluate each Grade 3 leak during the next scheduled survey, or within 15 months of date reported, whichever occurs first, until the leak is cleared, repaired, or re-graded. A leak requiring re-evaluation at periodic intervals includes any reading:

(A) of less than 80% LEL in small, gas-associated substructures;

(B) under a street in areas without wall-to-wall paving where it is unlikely the gas could migrate to the outside wall of a building; and

(C) of less than 20% LEL in a confined space.

(e) Post-repair inspections.

(1) A leak is considered to be effectively repaired when an operator obtains a gas concentration reading of 0%.

(2) For a repaired leak with a gas concentration reading greater than 0% at the time of repair, an operator shall conduct a post-repair leak inspection within 30 days after the repair to determine whether the leak has been effectively repaired. If the second post-repair inspection shows a gas concentration reading greater than 0%, the operator shall continue conducting post-repair leak inspections every 30 days until there is a gas concentration reading of 0%. If after six inspections have been performed the operator is unable to obtain a gas concentration reading of 0%, then the operator shall create a new leak report with a new leak grade determination.

(3) Post-repair inspections are not required for leak repairs completed by the replacement or insertion of an entire length of pipe or service line, or for the repair of leakage caused by excavator or third-party damage, provided a complete re-evaluation of the leak area after completion of repairs verifies that no further indications of leakage exist.

(4) Remedial measures such as lubrication of valves or tightening of packing nuts on valves which seal leaks are considered to be routine maintenance work and do not require a post-repair inspection.

(f) Upgrading. When an operator upgrades a leak to a higher grade, the time period for repair is the remaining time based on its original classification or the time allowed for repair under its new grade, whichever is less. This requirement does not apply to leaks that, at the time of discovery, an operator has classified at a lower grade pending a further, more complete investigation of the leak hazard area.

(g) Table. The following table provides a concise reference for leak grading and leak repair deadlines.
Figure: 16 TAC §8.207(g)

§8.208. Mandatory Removal and Replacement Program.

(a) Effective September 1, 2008, this section applies to each operator of a gas distribution system that is subject to the requirements of 49 CFR Part 192.

(b) For leaks identified on any underground compression coupling used to mechanically join steel pipe, each operator shall either replace the leaking compression coupling or repair it using a sleeve welded over the compression coupling.

(c) Each operator shall repair or replace any compression coupling used to mechanically join steel pipe that is exposed during operation and maintenance activities unless the operator can determine the coupling was installed after 1980.

(d) For leaks identified on any underground compression coupling used to mechanically join plastic pipe, each operator shall remove and/or replace the leaking compression coupling.

(e) For any other compression coupling used to join plastic pipe that is exposed during operation and maintenance activities, each operator shall:

(1) For plastic pipe two inches or less in diameter, replace or remove such coupling unless the operator can determine that the coupling is designated as an ASTM (American Society for Testing and Materials) D2513 Category 1 type fitting.

(2) For plastic pipe greater than two inches in diameter, replace or remove such coupling unless the operator can determine that the coupling is designated as an ASTM D2513 Category 1 or Category 3 type fitting.

(f) Each operator shall remove and replace all compression couplings at currently known service riser installations, identifiable by a meter number or a street address, if they are not manufactured and installed in accordance with ASTM D2513 for Category 1 fittings.

(g) Each operator shall complete the removal and replacement of such compression couplings by November 30, 2009.

(h) Any coupling installed on plastic pipe after September 1, 2008, shall be designed to meet the requirements of ASTM D2513 Category 1.

(i) Any coupling installed on steel pipe after September 1, 2008, shall be designed to meet the requirements of 49 CFR Part 192, §192.273.

(j) Beginning November 1, 2008, and every six months thereafter until all compression couplings on the operator's system subject to subsection (f) of this section have been removed and replaced, each operator shall file with the division a progress report showing the number of service riser installations checked, the condition of the coupling, and the total number of compression couplings replaced for that reporting period.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 5, 2008.

TRD-200802899
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: September 1, 2008
Proposal publication date: December 7, 2007
For further information, please call: (512) 475-1295

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 74. CURRICULUM REQUIREMENTS

SUBCHAPTER C. OTHER PROVISIONS

19 TAC §74.30

The State Board of Education (SBOE) adopts an amendment to §74.30, concerning identification of advanced courses. The amendment is adopted without changes to the proposed text as published in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3109) and will not be republished. Section 74.30 identifies advanced courses as referred to in the Texas Education Code (TEC), §33.081, concerning extracurricular activities. The adopted amendment modifies the definition of advanced courses and aligns the rule with newly amended TEC, §33.081, which narrows the number of courses that may be exempt from "No Pass, No Play" requirements.

The 80th Texas Legislature passed Senate Bill (SB) 1517, amending the TEC, §33.081, to define and restrict the courses that are exempt from the passing grade requirement for students to be eligible to participate in extracurricular activities. The TEC, §33.081, specifies that the courses that are exempt include all Advanced Placement (AP) and International Baccalaureate (IB) courses. Additional courses that are exempt include honors and dual credit courses in the subjects of English language arts, mathematics, science, social studies, economics, and languages other than English.

In accordance with the TEC, §33.081, the adopted amendment to 19 TAC §74.30 changes reference from "advanced" courses to "honors" courses throughout the rule, including the section title. The amendment places reference to College Board advanced placement courses and International Baccalaureate courses at the beginning of the section rather than repeating this language for each subject area that is listed in the rule. SB 1517 does not include fine arts in the list of honors and dual credit courses exempted; therefore, a modification is also adopted to language addressing fine arts courses. In addition, language is added to address grade point average (GPA) calculation of honors courses.

Following is a summary of comments received and corresponding SBOE responses regarding the proposed amendment.

Comment. An individual commented that AP courses are dinosaurs and are taken by a very small percentage of the population. The individual further stated that college connection programs should be accessible for any student with an acceptable average and classroom performance.

Response. The SBOE disagrees with the commenter's assessment of AP courses and took action to adopt the language as filed as proposed. The adopted amendment identifies the courses that are exempt from "No Pass, No Play" requirements. The adopted amendment does not address college connection programs.

Comment. An individual questioned why there are no honors classes in band, choir, and drama. The individual further commented that students should be rewarded in all areas in which they excel.

Response. The SBOE took action to adopt the language as filed as proposed. The courses identified as honors are based on courses designated by state law.

Comment. An individual asked how omission of AP courses will affect students.

Response. The SBOE took action to adopt the language as filed as proposed. AP courses have not been omitted.

Comment. An individual inquired about the rationale for the proposed amendment.

Response. The SBOE took action to adopt the language as filed as proposed. The adoption modifies language to align the rule with recently revised statute.

Comment. An individual expressed support for maintaining AP and IB coursework.

Response. The SBOE took action to adopt the language as filed as proposed.

Comment. An individual supported a statewide standard and noted that the categories of AP, IB, and dual enrollment college courses have a recognized quality.

Response. The SBOE took action to adopt the language as filed as proposed.

Comment. An individual concurred with the proposed amendment.

Response. The SBOE took action to adopt the language as filed as proposed.

Comment. A teacher from Eastland Independent School District commented that the language about calculation of GPA will create discrepancies among school districts when calculating GPA.

Response. The SBOE disagrees and took action to adopt the language as filed as proposed. Language adopted in new subsection (c) clarifies that the identification of advanced courses for the purpose of "No Pass, No Play" requirements has no bearing on the method a school district uses to calculate GPA. This decision was under local school district authority prior to the proposed amendment to this rule.

In accordance with the TEC, §7.102(f), the SBOE approved this rule action for final adoption by a vote of more than two-thirds of its members to specify an effective date earlier than the beginning of the 2008-2009 school year. The earlier effective date will allow districts time to make necessary changes to align with the TEC, §33.081, before the start of the next school year. The effective date of the adopted new section is 20 days after filing as adopted.

The amendment is adopted under the Texas Education Code, §33.081, which authorizes the SBOE by rule to limit participation

in and practice for extracurricular activities during the school day and the school week.

The amendment implements the Texas Education Code, §33.081.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 3, 2008.

TRD-200802868
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: June 23, 2008
Proposal publication date: April 18, 2008
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 213. PRACTICE AND PROCEDURE

22 TAC §213.12

The Texas Board of Nursing (BON) adopts an amendment without changes to §213.12 (Witness Fees and Expenses). The proposed amendment was published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3543). The adopted amendment to §213.12 is to allow a witness who has been subpoenaed by the Board or a party to a proceeding of the Board's to receive adequate reimbursement for their mileage. The rule was recently amended to increase the reimbursement rate to 48.5¢ for each mile, but due to the rising cost of fuel, the reimbursement rate allowed by the IRS has been increased again to 50.5¢. The Board adopts an amendment to the rule to allow the reimbursement rate to be tied to the federal income tax regulations reimbursement rate, so that the rule does not have to be constantly amended.

No comments were received in response to the proposed amendment.

The adoption is pursuant to the authority of Texas Occupations Code §301.151 and §301.152 that authorize the BON to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 4, 2008.

TRD-200802895
Katherine Thomas
Executive Director
Texas Board of Nursing
Effective date: June 24, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 305-6823

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CHAPTER 223. FEES

22 TAC §223.1

The Texas Board of Nursing adopts an amendment without changes to §223.1 (Fees). The proposed amendment was published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3543). The Board proposed to reduce the renewal fees for Registered and Vocational Nurses from $67 to $65 (RNs) and from $58 to $55 (LVNs) due to a $4.75 reduction in the fee for an FBI fingerprint-based criminal background check and the increased income from a higher number of RNs and LVNs renewing their licenses. Any excess funds collected from licensees go into the general revenue fund. The adopted amendment reflects this reduction.

No comments were received in response to the proposed amendment.

The proposed amendments of this chapter are pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorize the Texas Board of Nursing to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 4, 2008.

TRD-200802894
Katherine Thomas
Executive Director
Texas Board of Nursing
Effective date: June 24, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 305-6823

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER CC. STANDARDS FOR ACCELERATION-OF-LIFE INSURANCE BENEFITS FOR INDIVIDUAL AND GROUP POLICIES AND RIDERS

28 TAC §§3.4302, 3.4303, 3.4307 - 3.4311, 3.4313

The Commissioner of Insurance adopts amendments to §§3.4302, 3.4303, 3.4307 - 3.4311, and 3.4313, relating to the standards for acceleration-of-life-insurance benefits for individual and group policies and riders. The amendments are adopted without changes to the proposed text as published in the April 25, 2008, issue of the *Texas Register* (33 TexReg 3374).

REASONED JUSTIFICATION. The amendments are necessary to update obsolete statutory and internal Texas Administrative Code references and to correct minor nonsubstantive errors in

the existing rule. The adopted amendments do not make any substantive changes.

The adopted amendments update obsolete statutory references in the Texas Insurance Code. Insurance Code Article 3.50-6, which was referenced in §3.4303, was repealed in the nonsubstantive Insurance Code revision, Acts 2001, 77th Legislature, Chapter 1419, §31(a), effective June 1, 2003. Article 3.50-6 was re-adopted as §§1111.051 - 1111.053 in the same nonsubstantive Insurance Code revision. Insurance Code Article 3.70-8, which was referenced in §3.4303, was repealed in the nonsubstantive Insurance Code revision, Acts 2003, 78th Legislature, Chapter 1274, §26(a)(1), effective April 1, 2005. Article 3.70-8 was re-adopted as §§1201.003, 1201.059, 1201.105, 1351.002, and 1451.051 in the same nonsubstantive Insurance Code revision. Insurance Code Article 3.44a, which was referenced in §§3.4307 and 3.3409, was repealed in the nonsubstantive Insurance Code revision, Acts 2001, 77th Legislature, Chapter 1419, §31(a), effective June 1, 2003. Article 3.44a was re-adopted as Chapter 1105 in the same nonsubstantive Insurance Code revision. Insurance Code Article 3.28, which was referenced in §3.4310, was repealed in the nonsubstantive Insurance Code revision, Acts 2005, 79th Legislature, Chapter 727, §18(a)(3), effective April 1, 2007. Article 3.28 was re-adopted as §§425.051 - 425.070 in the same nonsubstantive Insurance Code revision. Insurance Code Article 21.21, which was referenced in §3.4311, was repealed in the nonsubstantive Insurance Code revision, Acts 2003, 78th Legislature, Chapter 1274, §26(a)(1), effective April 1, 2005. Article 21.21 was re-adopted as Chapter 541 in the same nonsubstantive Insurance Code revision. Adopted §3.4311(a) correctly references the title of Chapter 541 as "Unfair Methods of Competition and Unfair or Deceptive Acts or Practices."

The adopted amendments also correct obsolete internal Texas Administrative Code references. Previously, §3.4302(b)(2)(B) in the definition of the term "Long-term care illness" referenced home health care services "as defined and provided consistently with §3.3804(b)(13) and (14)." Amendments were adopted to §3.3804 on January 6, 2002 (26 TexReg 10886) to move paragraphs (13) and (14) to paragraphs (15) and (16). Adopted §3.4302(b)(2)(B) deletes the obsolete references to paragraphs (13) and (14) and uses the agency's general citation style, which references Long-term care illness "as defined and provided consistently with §3.3804(b)." Section 3.4313(a) referenced the definition of an "invitation to contract" as defined in §21.114 of Title 28 of the Texas Administrative Code. Amendments were adopted to §21.114 on December 9, 2007 (32 TexReg 8830) to delete the definition of "invitation to contract" and to §21.102 to add the definition of "invitation to contract." Adopted §3.4313(a) reflects these changes.

The adopted amendments also make changes to correct nonsubstantive errors. The adopted subchapter title includes hyphens in the phrase "Acceleration-of-Life-Insurance" to be consistent with the phrase as used throughout the subchapter. Section 3.4302(b)(2)(A) in the definition of the term "Long-term care illness" referenced "§3.3812 of this title (relating to Policy Definition of Provider)." Adopted §3.4302(b)(2)(A) references the section title of §3.3812 to correctly reflect its title as "Policy Standards for Provider." Adopted §3.4303(b) includes the word "the" before the phrase "Insurance Code" for consistency with agency style and makes changes in punctuation to correctly reflect the title of §3.4302 as "Acceleration-of-Life-Insurance: Scope of Benefits" in the reference to that section. Unnecessary commas are deleted in adopted §§3.4307, 3.4309, 3.4310, and 3.4311. Section 3.4308 did not include a reference to the complete title of §3.4306, and adopted §3.4308 correctly reflects the reference to the §3.4306 title as "Methods for Determining Benefits and Allowable Charges and Fees."

HOW THE SECTIONS WILL FUNCTION. The adopted sections update obsolete statutory and Texas Administrative Code references and correct other minor nonsubstantive errors and will result in increased clarity and readability of the rules. The adopted changes are nonsubstantive and do not affect the existing requirements of any sections.

SUMMARY OF COMMENTS. The Department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code §§1111.053, 1701.002, 1701.060, and 36.001. Section 1111.053 authorizes the Commissioner to adopt rules to implement Insurance Code Chapter 1111, Subchapter B, Accelerated Term Life Insurance Benefits. Section 1701.002 specifies that Chapter 1701 is applicable to a policy, contract, or certificate of accident or health insurance, medical or surgical insurance, life or term insurance, including group life or term insurance, endowment insurance, industrial life insurance, fraternal benefit insurance, an annuity or endowment contract, an application attached or required to be attached to the policy, contract or certificate, or a rider or endorsement to be attached to, printed on, or used in connection with the policy, contract, or certificate. Section 1701.060 authorizes the Commissioner to adopt rules necessary to implement Chapter 1701, Policy Forms, including rules that establish procedures and criteria under which each type of form submitted to the Department under Chapter 1701 will be reviewed and approved by the Commissioner or exempted under §1701.005(b), and procedures and criteria under which particular types of forms designated by the Commissioner may be given a summary review and approval, if considered appropriate by the Commissioner, to expedite review and approval of those forms. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 3, 2008.

TRD-200802867
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: June 23, 2008
Proposal publication date: April 25, 2008
For further information, please call: (512) 463-6327

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CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER D. RISK-BASED CAPITAL AND SURPLUS

28 TAC §7.401

The Commissioner of Insurance adopts amendments to §7.401, concerning risk-based capital and surplus requirements for insurers and health maintenance organizations. The section is adopted without changes to the proposal published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 860).

REASONED JUSTIFICATION. The amendments, which are necessary to regulate the 2006 risk-based capital and surplus requirements for insurers and health maintenance organizations (HMOs), adopt by reference the 2006 National Association of Insurance Commissioners (NAIC) Life Risk-Based Capital Report Including Overview and Instructions for Companies, the 2006 NAIC Fraternal Risk-Based Capital Report Including Overview and Instructions for Companies, the 2006 NAIC Property and Casualty Risk-Based Capital Report Including Overview and Instructions for Companies, and the 2006 NAIC Health Risk-Based Capital Report including Overview and Instructions for Companies. The adoption in §7.401(b)(3) clarifies that the health Risk Based Capital rule applies to insurers that file the Annual Statement Health Blank. This is necessary because life companies and property and casualty companies may also be authorized to write health insurance, and if such business constitutes 95 percent or more of their total business then the carriers are required to file the Health Blank. The section applies to property and casualty insurers, life insurance companies, fraternal benefit societies, stipulated premium companies that do business in other states, HMOs, and insurers filing the National Association of Commissioners (NAIC) Health Blank. These insurers and HMOs are referred to collectively as "carriers" in this adoption. The risk-based capital requirement is a method of ensuring that an insurer has an appropriate level of policyholders' surplus after taking into account the underwriting, financial, and investment risks of an insurer. The adopted section will provide the Department with a widely used regulatory tool to identify the minimum amount of capital and surplus appropriate for an insurance company to support its overall business operations in consideration of its size and risk exposure and provide for specific actions by the Commissioner or the reporting entity when the total adjusted capital of the reporting entity falls to certain levels. The adopted section also provides for specific actions by the Commissioner or the reporting entity when the total adjusted capital of the reporting entity falls to certain levels specified in the section. Finally, the adopted section is necessary to effect the consolidation of the existing risk-based capital rules.

HOW THE SECTION WILL FUNCTION. Adopted §7.401(b)(1) deletes fraternal benefit societies because they are subject to their own separate risk-based capital instructions as provided in §7.401(d)(2). Adopted §7.401(b)(2) deletes monoline financial guaranty insurers, monoline mortgage guaranty insurers and title insurers because the Risk Based Capital guidelines specifically exclude these types of insurers. Adopted §7.401(b)(3) clarifies that the health Risk Based Capital rule applies to insurers that file the Annual Statement Health Blank. Adopted §7.401(d) adopts by reference the 2006 formulas, including the 2006 NAIC Life Risk-Based Capital Report including Overview and Instructions for Companies, the 2006 NAIC Fraternal Risk-Based Capital Report Including Overview and Instructions for Companies, the 2006 NAIC Property and Casualty Risk-Based Capital Report Including Overview and Instructions for Companies, and the 2006 NAIC Health Risk-Based Capital Report Including Overview and Instructions for Companies. Adopted §7.401(g)(5) clarifies that the calculation of the trend test is in the RBC formula itself, not any other. Adopted §7.401(g)(4)(B) and (C) and (h) update the Insurance Code references for consistency with the revised Insurance Code enacted by the Texas Legislature.

SUMMARY OF COMMENTS. The Department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code Chapters 404 and 441 and §§441.051, 541.401, 822.210, 841.205, 884.206, 843.404, 885.401, 982.105, 982.106, and 36.001. Chapters 404 and 441 address the duties of the Department when an insurer's solvency is impaired. Chapter 404 authorizes the Commissioner to set standards for evaluating the financial condition of an insurer. Chapter 441 addresses the prevention of insurer delinquencies and in 441.051 specifies, "the circumstances in which an insurer is considered insolvent, delinquent, or threatened with delinquency" and includes certain statutorily specified conditions, including if a insurer's required surplus, capital, or capital stock is impaired to an extent prohibited by law. Under §441.005, the Commissioner may adopt reasonable rules as necessary to implement and supplement the purposes of Chapter 441. Section 541.401 authorizes the Commissioner to adopt reasonable rules necessary to accomplish the purposes of trade practices regulation in Chapter 541. Sections 822.210, 841.205, and 884.206 authorize the Commissioner to adopt rules to require an insurer to maintain capital and surplus levels in excess of statutory minimum levels to ensure financial solvency of insurers for the protection of policyholders and insurers. Section 843.404 authorizes the Commissioner to adopt rules to require a health maintenance organization to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of health maintenance organizations for the protection of enrollees. Section 885.401 requires each fraternal benefit society to file an annual report on the society's financial condition, including any information the Commissioner considers necessary to demonstrate the society's business and method of operation, and authorizes the Department to use the annual report in determining a society's financial solvency. Section 982.105 specifies the capital, stock, and surplus requirements for foreign or alien life, health, or accident insurance companies. Section 982.106 specifies the capital, stock, and surplus requirements for foreign or alien insurance companies other than life, health, or accident insurance companies. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 4, 2008.

TRD-200802875
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: June 24, 2008
Proposal publication date: February 1, 2008
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 30. OCCUPATIONAL LICENSES AND REGISTRATIONS

The Texas Commission on Environmental Quality (TCEQ, commission, or agency) adopts amendments to §§30.3, 30.111, 30.120, and 30.122.

Sections 30.3, 30.120 and 30.122 are adopted *with changes* to the proposed text as published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 867). Section 30.111 is adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted amendments create two new license classifications to be consistent with changes made to 30 TAC Chapter 344, Landscape Irrigation, Texas Occupations Code, §1903.251 and the addition of Texas Water Code (TWC), §49.238, and Local Government Code, §401.006, by House Bill (HB) 4, §13, HB 1656, §1, and Senate Bill (SB) 3, §2.34, 80th Legislature, 2007.

HB 4, §13 and §19 and SB 3, §2.34, direct the commission to adopt and enforce rules that govern: (1) the connection of an irrigation system to any water supply; (2) the design, installation, and operation of irrigation systems; (3) water conservation; and (4) the duties and responsibilities of irrigators. Additionally, as a result of this legislation, in a separate rulemaking, amendments are being adopted to Chapter 344 to enhance the duties of the installer and eventually, eliminate the installer license altogether.

HB 1656, §1, directs municipalities with populations of 20,000 or more to adopt ordinances that require an installer of an irrigation system to be licensed by the commission and obtain a permit before installing an irrigation system. These municipalities must adopt standards and specifications for designing, installing, and operating irrigation systems and include at a minimum, any rules adopted by the commission related to landscape irrigation. These municipalities may also employ or contract with a licensed plumbing inspector or licensed irrigation inspector to enforce the ordinances. Additionally, HB 1656 allows water districts to adopt rules that meet the same criteria as municipalities and may employ or contract with a licensed plumbing inspector, a licensed irrigation inspector, the district's operator, or other governmental entity to enforce the rules.

The commission administers the Landscape Irrigator and Installer Licensing Program that currently includes licenses for installers and irrigators. The adopted amendments specify requirements for individuals to obtain and maintain an occupational license to sell, design, install, maintain, alter, repair, or service an irrigation system, provide consulting services relating to an irrigation system, connect an irrigation system to any water supply, or inspect irrigation systems and perform other enforcement duties as an employee or as a contractor of a water purveyor.

TWC, §37.002 requires the commission to adopt any rules necessary to establish occupational licenses and registrations prescribed by Texas Occupations Code, §1903.251. Therefore, to meet the statutory requirements, the agency must create a new irrigation technician and landscape irrigation inspector license classification. The adopted amendments ensure that the agency's rules are consistent with statutory standards and that the rules are up-to-date and effective. The adopted amendments also make grammatical and punctuational corrections and incorporate language modifications needed to improve readability and enhance enforceability.

The requirements of HB 1656 became effective September 1, 2007. As required by §19 of HB 4, and SB 3, the commission must adopt standards no later than June 1, 2008, with an effective date of January 1, 2009. The effective date of the amendments to Chapter 30, Subchapters A and D is June 26, 2008.

SECTION BY SECTION DISCUSSION

Subchapter A - Administration of Occupational Licenses and Registrations

The adopted amendments to §30.3, Purpose and Applicability, add irrigation technicians and irrigation inspectors as entities regulated by the commission. To avoid any problems that could result if there were a delay in getting the applicable irrigation technician training and exam developed, the dates of December 31, 2008 and January 1, 2009 contained in §30.3(c) of the proposed rules was changed to June 1, 2009.

Subchapter D - Landscape Irrigators and Installers

The adopted amendments change the title of Subchapter D to Landscape Irrigators, Installers, Irrigation Technicians and Irrigation Inspectors.

The following phrase has been removed from the statutory authority language of Subchapter D. "Additionally, these amendments are also adopted under TWC, §49.238, concerning Irrigation Systems. These amendments are also adopted under Local Government Code, §401.006, concerning Irrigation Systems." These two statutes require or allow certain actions of municipalities and water districts with respect to the installations of landscape irrigation systems. However, they do not provide statutory authority to the commission with regards to rulemaking.

The adopted amendments to §30.111, Purpose and Applicability, add enforcement and inspection duties related to landscape irrigation systems. The adopted amendments also allow individuals holding an irrigation technician license issued after December 31, 2008, to perform those duties approved for the installer licensees in Chapter 344. Additionally, the adopted amendments require that those individuals that perform the tasks listed in adopted §30.111(a)(4) meet the qualifications of this chapter, be licensed according to Subchapter A, unless exempt under §30.129, and comply with the requirements of Chapter 344.

The adopted amendments to §30.120, Qualifications for Initial License, detail the requirements for individuals to obtain an initial installer license prior to June 1, 2009 and for obtaining an initial irrigation technician license after December 31, 2008. The date was changed to June 1, 2009 from the January 1, 2009 date in the proposed rules to avoid any problems that could result if there were a delay in getting the applicable irrigation technician training and exam developed. The adopted amendments also detail the requirements to obtain an initial irrigation inspector license. Additionally, the phrase "an approved landscape irrigation inspection course" has been added to §30.120(e) to allow completion of an approved landscape irrigation inspection course as an alternative for individuals who had not completed the basic irrigator, backflow prevention assembly testing and water conservation or water audit training courses.

The adopted amendments to §30.122, Qualifications for License Renewal, detail the requirements for individuals to renew an installer license which expires prior to June 1, 2009 and to renew irrigation technician and irrigation inspector licenses. The December 31, 2008 and January 1, 2009 dates contained in the proposed rules was changed to June 1, 2009 to avoid any problems to the regulated community that could result if there were a delay in getting the applicable irrigation technician training and examination developed in a timely manner.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rules do not meet the criteria for a major environmental rule. Texas Government Code, §2001.0225, defines a major environmental rule as one that is specifically intended to protect the environment, or reduce risks to human health from environmental exposure. The adopted rules are intended to create a licensing program for individuals who perform irrigation technician duties. An irrigation technician is defined as an individual who, under the direct supervision of a licensed irrigator, installs, maintains, alters, repairs, or services an irrigation system, or connects an irrigation system to any water supply. The adopted rules are also intended to create a licensing program for individuals that will perform irrigation inspector duties. An irrigation inspector is defined as a person who inspects irrigation systems and performs other enforcement duties as an employee or as a contractor of a water purveyor and is required to be licensed under Chapter 30. Training requirements and enforcement for noncompliance for the irrigation technician and irrigation inspector will be addressed in the adopted rules. Protection of human health and the environment may be a by-product of the adopted rules, but it is not the specific intent of the adopted rules. Furthermore, the adopted rules will not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the rules would simply add licensing requirements for irrigation technicians and irrigation inspectors and address training requirements and enforcement for noncompliance. The adopted rules do not meet the definition of a major environmental rule as defined in the Texas Government Code.

In addition, the adopted amended sections are not subject to Texas Government Code, §2001.0225, because they do not meet the criteria specified in §2001.0225(a). Texas Government Code, §2001.0225(a), applies to a rule adopted by an agency, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted amended sections to Chapter 30 do not meet any of these requirements. First, there are no federal standards that these rules will exceed. The United States Environmental Protection Agency does not have a federal program for landscape irrigation systems and does not establish requirements for states that implement their own landscape irrigation programs. Second, the rules do not exceed an express requirement of state law but are being adopted to implement state law. Third, there is no delegation agreement that could possibly be exceeded by these rules. Fourth, the commission adopts these rules to allow licensing requirements for irrigation technicians and irrigation inspectors, and address training requirements and enforcement for noncompliance, in compliance with the statute. Therefore, the commission does not adopt the rules solely under the commission's general powers.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these adopted rules is to ensure consistency between the rules and their applicable statutes, by creating a licensing program for irrigation inspectors and irrigation technicians. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These adopted rules would only make non-substantive changes to the existing rules and adopt new regulations that do not affect private real property.

The commission invited public comment regarding the consistency with the Takings Impact Assessment during the public comment period. No comments were received.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is editorial, administrative, and procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the CMP.

PUBLIC COMMENT

The proposal was published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 867). The commission held a public hearing on February 26, 2008. The comment period closed on March 3, 2008. The commission received comments from Accord Irrigation Technologies (Accord), Austin Lawn Sprinkler Association (Austin Lawn), Austin Water Utility (AWU), City of El Paso (El Paso), Dallas Irrigators Association (DIA), Degreed Landscaping (Degreed), Dew Drip Irrigation (Dew Drip), East Texas Irrigation Association (East Texas), El Paso Irrigation Association (EPIA), Green Industry Alliance (GIA), Irrigation Association (IA), James Stewart Irrigation (Stewart), Lone Star Chapter of the Sierra Club (Sierra Club), Longhorn Services (Longhorn), Lower Colorado River Authority (LCRA), Mac's Landscaping & Irrigation (Mac's), Texas Panhandle Irrigation Association (TPIA), Prince Irrigation (Prince), Rio Grande

Valley Irrigation Association (Rio Grande Valley), San Antonio Irrigation Association (SAIA), Smart Outdoor Services (Smart), South Plains Irrigation Association (SPIA), Turf Pro (Turf), Water Smart Irrigation, Inc (Water Smart) and nine individuals. The overall comments were supportive of the rule revisions. There were two commenters with issues that resulted in changes to the proposed rules. These changes are identified in the section titled Response to Comments. Additionally, there were several comments that addressed issues or suggested changes that were outside the scope of this rulemaking and no changes were made as a result of those comments.

RESPONSE TO COMMENTS

General Comments

Prince commented that paying a $111 licensing fee, completing a week long training course and passing an exam that has been simplified because too many applicants were failing has made it too easy to get into the irrigation business.

The commission responds that the commenter did not provide sufficient details as to the particular license at issue. Additionally, the commission has not made changes to any examinations in order to increase the passing rate. Therefore, the commission was not able to provide a response to this comment. No changes were made to the rules as a result of the comment.

Prince commented that it is ironic that the new rules require an irrigation drawing on each system and the requirement for creating an irrigation drawing was removed from the exam during the last revision of the irrigator exam.

The commission responds that the basic irrigator course includes the necessary training for designing and drawing irrigation systems. A review of the irrigator examination was conducted in 2001. The work group that was comprised of Irrigation Council members and commission staff determined that the irrigation drawing completed during the examination was burdensome and not necessary to determine the competency of the applicant for the license. Instead, the workgroup developed questions that use depictions of irrigation drawings and charts to test the individual's knowledge of this subject. No changes were made to the rules as a result of this comment.

Prince commented that it seemed the state would rather maintain a lot of licensees who are poorly qualified and place the burden of professionalism and efficiency on the water purveyors by requiring them to inspect the irrigation systems.

The commission responds that the commenter did not provide specific details or examples of inadequacy to demonstrate that licensees are poorly qualified, nor identify any problems in the required training that would lead to licensees being poorly qualified. No changes were made to the rules as a result of this comment.

Degreed, Longhorn and two individuals commented that there is a need for irrigation training and testing to be in Spanish as well as English. The commenters feel that the majority of laborers in the irrigation industry are Hispanic and while some speak English their native language is Spanish. This puts them at a disadvantage of not being able to take training courses and the exams in Spanish.

The commission responds that developing training and examinations in specific languages are outside the scope of this rulemaking. No changes were made to the rule as a result of this comment.

East Texas and Mac's commented that the rules for the irrigation industry should not be more restrictive than similar trades such as electrical, plumbing, or the pesticide applicators licenses. East Texas, Mac's and one commenter representing Rio Grande Valley commented that the licensed technician language should be removed from the rules. East Texas, Mac's and TPIA commented that three levels of license are needed in the irrigation program: (1) Installer - responsible to begin learning the irrigation business from the bottom up (similar to an apprentice in the plumber or electrical industry; (2) Technician - individual who has been on the job for two years, has taken training courses, and has passed any applicable exam. Technician would be able to supervise and take on some irrigation responsibilities; and (3) Licensed Irrigator - Individual who has been a licensed Technician for two years, completed training courses and has passed any applicable exam.

The commission responds that the commenter did not provide specific details regarding concerns that how the proposed rules for the irrigation industry are more restrictive than similar trades. Regarding the removal of irrigation technician language from the rules, TWC, Chapter 37 requires the commission to establish requirements and uniform procedures for issuing licenses and registrations. 30 TAC Chapter 344 outlines specific job duties and responsibilities for the irrigation technician. Therefore, to meet the requirements of TWC Chapter 37 and in support of 30 TAC Chapter 344, the requirements for establishing requirements and uniform procedures for issuing irrigation technician licenses are included in the Chapter 30 rules. With regard to the establishment of a multi-tiered license system and revisions for the requirements to obtain an irrigator's license (i.e. requiring irrigation experience to qualify to obtain an irrigator license), these were not part of the original rule revision proposal. Including these changes at this point would be considered increasing the scope of the proposed rules which could have a significant impact on existing and prospective applicants. The Administrative Procedure Act precludes making such changes without adequate public notice and giving parties an opportunity to comment on such issues. No changes were made to the rule as a result of this comment.

One commenter representing Rio Grande Valley suggested leaving the licensed technician language in the rules.

The commission recognizes and appreciates the comment. No changes were made to the rules as a result of this comment.

Turf commented that the rule revisions are needed and welcomes the changes, but also commented that a little clarification is needed in a few areas.

The commission appreciates the comment. The commission has attempted to make the rules as clear as possible. However, the commenter did not identify which specific areas of the rules needed clarification. No changes were made to the rules as a result of the comment.

Accord commented that irrigation consultants, designers, installers, repair technicians, system operators, and inspectors must be experienced (journeyman or field experience), licensed (based upon education, testing and experience) and responsible to carry out the requirements of Chapter 344.

The commission agrees that individuals who (1) sell, design, install, maintain, alter, repair, or service an irrigation system; (2) provide consulting services relating to an irrigation system; (3) connect an irrigation system to any water supply; or (4) inspect an irrigation system must comply with the requirement in Chapter

344 and must be licensed according to Chapter 30, Subchapters A and D unless they are exempt under §30.129, Exemptions. Currently, the licensed irrigator performs those duties described by items one through three. The inspections of irrigation systems will be performed by the newly created licensed irrigation inspector. Revisions to the requirements for obtaining an irrigator's license were not part of the original rule proposal. Changes to the irrigator licensing requirements such as requiring individuals to have journeyman or field experience to obtain a license would be considered a major change to the scope of the proposed rules which could have a substantial impact on applicants and the regulated community. The Administrative Procedure Act precludes making such changes without adequate public notice and giving affected parties an opportunity to comments on such issues. With regard to requiring individuals to have journeyman or field experience to obtain an irrigation inspector license, the commission feels that this issue would be best addressed by the hiring entity (municipality, water district, etc.), who will have the opportunity to include experience requirements when advertising to fill a position or contract with a licensed irrigation inspector. No changes were made to the rules as a result of the comment.

Accord commented that the required date of the new irrigation inspector and irrigation technician licenses should be no less than two years after the test, study guides and testing systems are available. Study, testing and license issuance would make two years a short time. Field experience should be a requirement to be completed during the two years or during a specific time thereafter for the license to be effective.

The commission responds that phasing in the requirement to have an irrigator or irrigation technician on site beginning January 1, 2010 will give the regulated community 18 months to prepare for the new requirement. The phase-in period allows sufficient time for prospective irrigation technician licensees to successfully complete the required training and the examination. However, in the event of a delay in developing training and exams and to avoid causing any problems to the regulated community, the date that installer applications will no longer be accepted has been extended until June 1, 2009. The commission disagrees with the suggested requirement of two years of field experience before the license can be effective. Successful completion of the training will provide the individual with sufficient knowledge and skills to perform the duties. Along with that and only after the successful completion of the examination, to verify competency, will the license be issued. No changes were made to the rules as a result of the comment.

El Paso, EPIA, Mac's, and IA commented that before a license is issued the rules should require each irrigation contractor submit to the TCEQ a bond or proof of insurance.

The commission responds that changes to the irrigator licensing requirements such as requiring individuals to post a bond or document proof of insurance to obtain a license would be considered a major change to the scope of the proposed rules which could have a substantial impact on applicants and the regulated community. The Administrative Procedure Act precludes making such changes without adequate public notice and giving affected parties an opportunity to comments on such issues. The commission believes that this issue would be best addressed at a local level through the municipalities or water districts, who could incorporate such requirements through their permitting procedures, if they felt such requirements were necessary. No changes were made to the rule as a result of this comment.

Dew Drip commented that many of the rules are too extreme and some of the rules need to be combined and made more user friendly.

The commission responds that the commenter did not specifically identify which rules were too extreme, or those that could have been combined and made more user friendly. No changes were made to the rules as a result of the comment.

Stewart commented that the new rules are in the right direction, but could have been stronger.

The commission appreciates the comment. However, the commenter did not specifically identify which rules needed to be strengthened. No changes were made to the rules as a result of the comment.

Comments to Preamble

One individual asked how the specific numbers were generated and calculated for the preamble.

The commission responds that the numbers used in Figure: 30 TAC Chapter 30 - preamble are based on the number of irrigation technician and irrigation inspector licenses projected to be issued over the next five years after the adoption of the proposed rules. These numbers also project the revenues that are expected to be generated during that same time period. These projections are based on discussions with the regulated community and historical trends of other licensing programs. No changes were made to the rules as a result of the comment.

Comments to Fiscal Notes - Costs to State and Local Government

One individual asked what happens to the fees collected for the two new licensing programs (irrigation inspector and irrigation technician). Has there been a determination on how to use these collected fees?

The commission responds that TWC, §37.009, allows the commission to establish and collect fees to cover the cost of administering and enforcing this chapter and the licenses and registrations issued under this chapter. The fees collected are used by the TCEQ to administer the agency's Occupational Licensing Program and enforce the applicable rules and statutes. No changes were made to the rules as a result of the comment.

One individual asked how the salary range of $29,000 and $50,000 per year was determined. The individual commented that if most licensed irrigators have an annual salary higher than this amount, what is the benefit or gain for one to stop their irrigation business and pursue an irrigation inspector license. Prince commented that the amount for local governments to hire a licensed irrigation inspector would be much more than the $29,000 to $50,000 stated in the preamble.

The commission responds that the salary range of $29,000 to $50,000 for irrigation inspectors was derived from discussions with municipalities that currently conduct irrigation inspections. The lower range of the salaries was from smaller municipalities and went up as the size of the municipality and individual qualifying requirements increased. With regard to the comment that this range of salaries is below what most irrigators currently make, the commenter did not provide statistical data to support this statement. The commission is unable to make a determination what benefit or gain there would be for an individual to stop an irrigation business and pursue an irrigation inspector license due to many variable factors, such as the individual's income from the irrigation business, age, health, etc. The individ-

ual would have to consider such factors and make the decision based on individual circumstances. No changes were made to the rules as a result of the comment.

Comments to Fiscal Notes - Small Business and Micro-Business Assessment

One individual commented that with regard to the small business and micro-business assessment contained in the preamble the rules would have adverse fiscal implications. Small or micro-businesses are expected to cover the cost of training and licenses, which means the cost of irrigation services will go up according to the direct number of employees an employer pays for in training, Continuing Education Units (CEUs), licenses, renewals, etc. Not all companies will have an average cost to perform these services, based on the number of employees the employer pays for. This will cause more pricing confusion for the consumers.

The commission responds that the irrigator license remains the same with no additional training requirements added. The irrigation technician license replaces the installer license and will require completion of a training course. However, the duties of the irrigation technician have been expanded to give them the ability to provide supervision of worksites and crews that would have otherwise required a licensed irrigator. The continuing education requirements for renewal of irrigator technician license has also been limited to 16 hours which reduces cost to small and micro businesses. There is no mandatory requirement to have licensed irrigation technicians, if the licensed irrigator is providing all necessary supervision and oversight. No changes were made to the rules as a result of this comment.

Comments to Subchapter A: Administration of Occupational Licenses and Registrations

GIA commented that with regard to §30.33(c) existing licensed installers that will have to "start over" and become a licensed irrigation technician should receive CEU credits for the first year of their new licensed technician designation. GIA feels that this is a small recognition for those folks that currently hold licensed installer license.

The commission responds that the proposed irrigation technician license is a new license with duties and responsibilities that are much greater than those of the existing installer. Additional CEUs for renewal of the license must be obtained after the license is issued, but before the expiration of the license. No changes were made to the rule as a result of this comment.

Comments to Subchapter D: Landscape Irrigators, Installers, Irrigation Technicians and Irrigation Inspectors

§30.111, Purpose and Applicability

GIA and SAIA commented that clarity needs to be added to §30.111(a)(4) relating to who can hire an inspector. GIA and SAIA suggested modifying the proposed language to read "inspect irrigation systems and perform other enforcement duties as an employee or as a contractor for a water purveyor or municipality."

The commission responds that HB 1656 allows a municipality or water district to employ or contract with a licensed plumbing inspector, licensed irrigation inspector, or district operator for water districts to enforce the adopted ordinances or rules. Adding the suggested language would restrict licensed irrigation inspectors from working for other entities or individuals requesting irrigation inspections. No changes were made to the rules as a result of the comment.

IA suggested the following language be added to §30.111: "In furtherance of the provision of this section, and to prevent improperly installed and maintained irrigation systems, any person or entity that engages and/or performs any of the tasks listed in subsection (a) of this section without the license required in this section is subject to a fine."

The commission responds that §30.111 outlines the purpose and applicability of Chapter 30, Subchapter D, relating to Landscape Irrigators, Installers, Irrigation Technicians and Irrigation Inspectors. That purpose is to establish qualifications for issuing and renewing licenses to individuals who: (1) sell, design, install, maintain, alter, repair, or service an irrigation system; (2) provide consulting services relating to an irrigation system; (3) connect an irrigation system to any water supply; or (4) inspect irrigation systems. Enforcement actions relating to individuals or entities performing these duties without a license and which may include administrative penalties will be addressed through Chapter 344 and Chapter 70, Enforcement. No changes were made to the rules as a result of the comment.

§30.120, Qualifications for Initial License

One individual commented that the proposed date of January 9, 2009 for implementing the irrigation technician license is too aggressive and unrealistic. Given that the proposed rules will not become effective until June of 2008, and considering the time necessary to study, schedule the exam, wait for the results and obtain the license, it would be more realistic to perhaps implement this requirement in June 2009.

The commission responds that the phase-in of the requirement to have an irrigator or irrigation technician on site beginning January 1, 2010 will give the regulated community 18 months to prepare for the new requirement. The phase-in period should allow sufficient time for successful completion of the required training and examination, to meet the demand for on-site supervision. However, in the event of a delay in developing training and exams and to avoid causing any problems to the regulated community, the date that installer applications will no longer be accepted has been extended until June 1, 2009. The rule language has been modified to reflect this change.

El Paso, EPIA, SAIA and SPIA requested that existing installer licenses be grandfathered to irrigation technician licenses or in lieu of grandfathering require existing installers to take only the portion of the irrigation exam needed to upgrade them to obtain an irrigation technician license.

The commission appreciates the comment, but respectfully disagrees with the suggestion to grandfather the existing installer licenses to an irrigation technician licenses. Under the current rules, no training is required to obtain an installer license. The individual is only required to pass an examination. Therefore, it is pertinent that individuals wishing to obtain an irrigation technician license complete the required training and pass the applicable examination, so they will know what duties they can perform and what is entailed in the performance of those duties. No changes were made to the rules as a result of the comment.

GIA questioned since only 16 hours of CEUs is being required for the renewal of the irrigation technician license is that license only valid for two years.

The commission responds that the irrigation technician license will have a validity period of three years and will require only 16

CEUs for the renewal of the license. No changes were made to the rule as a result of this comment.

DIA and Smart commented that the Irrigation Technician exam will have to be much more comprehensive and more similar to the existing licensed Irrigator exam. However, if the exam is too difficult, there could be an incentive for individuals to skip obtaining an Irrigation Technician license and go directly to applying for the irrigator license.

The commission responds that the creation of exams and the difficulty of the questions to be included in the exams are beyond the scope of this rulemaking. No changes were made to the rules as a result of this comment.

Degreed commented that to ensure better irrigation designs, the TCEQ should require individuals have three to five years of irrigation experience before being able to apply for an irrigator license. If the individual has been working for an irrigation company, a notarized affidavit from the irrigation company verifying the work experience would be acceptable until three to five years after the implementation of the irrigation technician training course and exam. AWU commented that they support some on the job training to obtain an irrigator's license. Additionally, one individual commented that §30.120(c) should be modified to require an individual to have two years on-the-job training as an irrigation technician under the supervision of a licensed irrigator prior to applying for the irrigator license.

The commission responds that revisions to the requirements for obtaining an irrigator's license were not part of the original rule proposal. Changes to the irrigator licensing requirements would be considered a major change to the scope of the proposed rules which could have a substantial impact on applicants and the regulated community. The Administrative Procedure Act precludes making such changes without adequate public notice and giving affected parties an opportunity to comments on such issues. No changes were made to the rule as a result of this comment.

TPIA and Water Smart commented that they believe the irrigation inspectors need to be experienced, licensed irrigators with three to five years experience in the irrigation industry in addition to completing the required training and passing any applicable exam. DIA commented that ideally, the irrigation inspector would have multiple years in irrigation experience and have more than the minimum requirements of an entry-level irrigator. El Paso and EPIA also commented that the irrigation inspector should have an experience level that is required and some hands-on experience in order to enforce the rules professionally as required by Chapter 344. Dew Drip and one individual commented that §30.120(e) should be modified to require an individual have two years of practical experience to qualify to obtain a irrigation inspector license.

The commission responds that requiring applicants for the irrigation inspector license to complete basic courses relevant to the irrigation systems, backflow prevention and water conservation or a landscape irrigation inspection course will provide the applicant with the basic knowledge to conduct inspections. The hiring entity (municipality, water district, etc.) will have the opportunity to include experience requirements when advertising to fill a position or contract with a licensed irrigation inspector. No change was made to the rule as a result of this comment.

Accord commented that plumbing inspectors or licensed irrigation inspectors must, at a minimum, meet the requirements of a licensed irrigator or technician to carryout effective inspections to ensure life, safety and water conservation. Additionally, Dew Drip commented that the plumbing inspectors have no education or continuing education requirements and the requirements for the irrigation inspector should be lighter or the requirements for the plumbing inspectors need to be raised. The two should have the same requirements. Additionally, AWU and LCRA commented that they recently conducted an irrigation inspection training program for city plumbing inspectors performing irrigation system inspections and support the following training requirements.

Initial training consisting of a minimum of three four-hour classes including - two hours covering new regulations; four hours to cover system components and the basics of reading an irrigation design; four hours of field demonstration of an irrigation system; and two hours covering irrigation inspection process and procedures.

The following specific topics should be covered - controller boxes (and multiple controller boxes); wiring; hydro-zoning; valves; rain shutoffs; overspray; head spacing; common system irregularities; and water budgeting.

The commission responds that HB 1656 allows a municipality and water district to employ or contract with a licensed plumbing inspector to enforce the adopted ordinances or rules. However, TCEQ does not have the authority to require plumbing inspectors to take landscape irrigation training. Municipalities and water districts can establish additional training requirements for plumbing inspectors that they may hire or contract with to perform the related work. No change was made to the rule as a result of this comment.

Sierra Club commented that in order for the new irrigation standards to be implemented properly, any individuals that inspect the systems must be adequately trained in order to evaluate systems fairly and consistently. Sierra Club supports the recommendations of the LCRA and the City of Austin in regards to training inspectors.

The commission recognizes and appreciates the comment. No changes were made to the rules as a result of the comment.

One individual commented that if an individual currently holds in good standing an irrigator license, backflow assembly tester license, and a recognized and accepted irrigation auditing certification, they should be exempted from taking the irrigation inspector exam. At the least, the applicant should only be required to either take an enforcement section of the exam or be granted reciprocity.

The commission responds that although the applicable training may have been taken by an individual, the successful completion of the applicable examination is needed to verify competency of the individual to perform the irrigation inspector duties. Furthermore, an individual who holds a backflow prevention assembly tester license or irrigation auditing certification that has not taken any other training may not have the knowledge and skills needed to perform the duties of the irrigation inspector. No changes were made to the rule as a result of this comment.

One individual commented that the requirements contained in §30.120(e)(2) are too stringent and recommends the applicants only need to complete the basic irrigator course. The new requirements for the irrigation inspector are more than what is required of the licensed irrigator. The inspector will not be testing backflow prevention devices or performing water audits, so should not be required to take the backflow or water audit/conservation training.

The commission responds that §30.120(e) should have contained a provision to allow completion of an approved landscape irrigation inspection course for individuals who had not completed the basic irrigator, backflow prevention assembly testing and water conservation or water audit training courses. Changes have been made to the rules as a result of this comment.

GIA and SAIA commented that the language in §30.120(d)(4) be modified to allow the basic irrigation technician course to be taught by a TCEQ approved training provider to individuals of an irrigation company at their place of business. The irrigation contractor should be allowed to hire an instructor for the purposes of training his employees "in house" should he choose that option. This is necessary to deal with the competitive work force within the industry.

The commission responds that "in house" training is permissible if the training is conducted by a TCEQ approved training provider and is given specifically to that contractor's employees, and is not open to outside individuals. Section 30.28 outlines specifics for conducting training. No changes to the rules have been made as a result of this comment.

GIA, SAIA and one individual commented that §30.120(f) be modified to allow an individual possessing a irrigation inspector license, but also obtaining or currently holding a irrigator license to move that irrigator license to an inactive status while performing inspection duties. Alternatively, the individual should be allowed to move the irrigation inspector license to an inactive status should he want to resume irrigator duties.

The commission responds that proposed revisions to the rules did not address any requirements for placing a current irrigator's license into an inactive status during the time the same individual holds an irrigation inspectors license. Changes such as this would be considered a major change to the scope of the proposed rules which could have a substantial impact on applicants and other licenses regulated by the commission. The Administrative Procedure Act precludes making such changes without adequate public notice and giving affected parties an opportunity to comment on such issues. No changes were made to the rule as a result of this comment.

§30.122, Qualifications for License Renewal

Degreed and Dew Drip commented that to ensure the irrigation inspectors are up-to-date on rules and changing technology they need to obtain eight CEUs per year to renew their license.

The commission appreciates the comment and that the CEU requirements for renewing an irrigation inspector license is set at 24 hours pursuant to §30.122(f)(2). No changes were made to the rule as a result of this comment.

§30.129, Exemptions

One individual commented that §30.129(b)(4) is a broad exemption for public employees doing work on public property in allowing those individuals to design and install entire systems without demonstrating any knowledge of water conservation whatsoever and this rule package needs to address this issue.

The commission responds that this comment is beyond the scope of this rulemaking. The exemption requirements contained in §30.129(b)(4) are based on statutory requirements contained in Texas Occupations Code, §1903.002. The commission does not have the authority to change statutory requirement by rule revisions. No changes were made to the rule as a result of this comment.

Oral Comments from Public Hearings

Degreed, East Texas and TPIA made oral comments that reiterated those written comments they had previously submitted.

The commission recognizes and appreciates the comments. The commission responded to those comments when addressing these entities' written comments.

One individual made an oral comment regarding technical issues with the irrigation program (i.e. the requirement of final inspections, head spacing, head pressure, use of solvents, etc.).

The commission recognizes and appreciates the comment. However, the comments did not address any specific issues related to the actual proposed licensing rules. No changes were made to the rule as a result of this comment.

Several oral comments were taken during the public hearing related to Rule Project Number 2007-027-344-CE which also related to issues contained in Rule Project Number 2007-031-030-CE. The comments are as follows:

DIA, TPIA and IA made oral comments that reiterated those written comments they had previously submitted which addressed both Rule Project Number 2007-027-344-CE and Rule Project Number 2007-031-030-CE.

The commission responded to those comments when addressing these entities' written comments.

Austin Lawn made an oral comment that educational backgrounds and language barriers could be a major focal point with applicants passing the irrigation technician exam.

The commission appreciates the comments and responds that developing training and exams in specific languages is beyond the scope of this rulemaking. No changes were made to the rule as a result of this comment.

One individual made an oral comment that the current irrigation exam is at a third-grade level and tries to deal primarily with the tradesman out in the field. The examination is something that needs to be addressed, as right now a number of the individuals, even able to pass the exam, are not qualified to hold the license.

The commission responds that the creation of exams and the difficulty of the questions to be included in the exams are beyond the scope of this rulemaking. No changes were made to the rules as a result of this comment.

One individual made an oral comment that the irrigation program needs a consultant's license and that no current licensees should be grandfathered in obtaining such a license.

The commission recognizes and appreciates the comment. However, since the creation of a consultant's license was not part of the original rule revision proposal, including the creation of this license would be considered a major change to the scope of the proposed rules. The Administrative Procedure Act precludes making such changes without adequate public notice. No changes were made to the rule as a result of this comment.

One individual made oral comment that more emphasis should be put on the design portion of the irrigators exam.

The commission responds that the creation of exams and the amount of emphasis that will be placed on one section of an exam over another section (i.e. design versus hydraulics) is beyond the scope of this rulemaking. No changes were made to the rules as a result of this comment.

WI, SI and one individual made oral comment that plumbing inspectors should have to have irrigation training before performing inspection on irrigation systems.

The commission responds that HB 1656 allows a municipality or water district to employ or contract with a licensed plumbing inspector to enforce the adopted ordinances or rules. However, TCEQ does not have the authority to require plumbing inspectors to take landscape irrigation training. Municipalities and water districts can establish additional training requirements for plumbing inspectors that they may hire or contract with to perform the related work. No change was made to the rule as a result of this comment.

SUBCHAPTER A. ADMINISTRATION OF OCCUPATIONAL LICENSES AND REGISTRATIONS

30 TAC §30.3

STATUTORY AUTHORITY

This amendment is adopted under Texas Water Code (TWC), §5.013, concerning the General Jurisdiction of the Commission; TWC, §5.102, concerning General Powers; and TWC, §5.103, concerning Rules. This amendment is also adopted under TWC, Chapter 37, §§37.001 - 37.015, concerning: Definitions; Rules; License or Registration Required; Qualifications; Issuance and Denial of Licenses and Registrations; Renewal of License or Registration; Licensing Examinations; Training; Continuing Education; Fees; Advertising; Complaints; Compliance Information; Practice of Occupation; Roster of License Holders and Registrants; and Power to Contract. This amendment is also adopted under Texas Occupations Code, §1903.053, concerning Standards, Texas Occupations Code, §1903.251, concerning License Required.

This adopted amendment implements TWC, §§5.013, 5.102, 5.103, 37.001-37.015 and Texas Occupations Code, §1903.053 and §1903.251.

§30.3. Purpose and Applicability.

(a) The purpose of this chapter is to consolidate the administrative requirements and establish uniform procedures for the occupational licensing and registration programs prescribed by Texas Water Code, Chapter 37. This subchapter contains general procedures for issuing, renewing, denying, suspending, and revoking occupational licenses and registrations. Subchapters B - L of this chapter (relating to Backflow Prevention Assembly Testers; Customer Service Inspectors; Landscape Irrigators, Installer, Irrigation Technicians and Irrigation Inspectors; Leaking Petroleum Storage Tank Corrective Action Project Managers and Specialists; Municipal Solid Waste Facility Supervisors; On-Site Sewage Facilities Installers, Apprentices, Designated Representatives, Maintenance Providers, and Site Evaluators; Water Treatment Specialists; Underground Storage Tank On-Site Supervisor Licensing and Contractor Registration; Wastewater Operators and Operations Companies; Public Water System Operators and Operations Companies; and Visible Emissions Evaluator Training Providers) contain the program-specific requirements related to each program.

(b) The requirements of this chapter apply to the following occupational licenses and registrations:

(1) backflow prevention assembly testers;

(2) customer service inspectors;

(3) landscape irrigators, installers, irrigation technicians and irrigation inspectors;

(4) leaking petroleum storage tank corrective action specialists and project managers;

(5) municipal solid waste facility supervisors;

(6) on-site sewage facility installers, designated representatives, apprentices, maintenance providers, and site evaluators;

(7) water treatment specialists;

(8) underground storage tank contractors and on-site supervisors;

(9) wastewater operators and operations companies;

(10) public water system operators and operations companies; and

(11) visible emissions evaluators training providers.

(c) Effective January 1, 2010, the installer license will no longer be valid and will be replaced by an irrigation technician license. No new or renewal installer license applications will be accepted after June 1, 2009. Existing installer licenses or those renewed after the effective date of these rules, but prior to June 1, 2009 will remain valid until December 31, 2009 or their expiration date, whichever occurs first.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. LANDSCAPE IRRIGATORS, INSTALLERS, IRRIGATION TECHNICIANS AND IRRIGATION INSPECTORS

30 TAC §§30.111, 30.120, 30.122

STATUTORY AUTHORITY

These amendments are adopted under Texas Water Code (TWC), §5.013, concerning the General Jurisdiction of the Commission; TWC, §5.102, concerning General Powers; and TWC, §5.103, concerning Rules. These amendments are also adopted under TWC, Chapter 37, §§37.001 - 37.015, concerning: Definitions; Rules; License or Registration Required; Qualifications; Issuance and Denial of Licenses and Registrations; Renewal of License or Registration; Licensing Examinations; Training; Continuing Education; Fees; Advertising; Complaints; Compliance Information; Practice of Occupation; Roster of License Holders and Registrants; and Power to Contract. These amendments are adopted under the Texas Occupations Code, §§1903.001, 1903.002, 1903.053 and 1903.251, concerning Definitions, Exemptions, Standards and License Required.

These adopted amendments implement TWC, §§5.013, 5.102, 5.103, 37.001 - 37.015; Texas Occupations Code, §§1903.001, 1903.002, 1903.053 and 1903.251.

§30.120. Qualifications for Initial License.

(a) To obtain an installer license prior to January 1, 2009, an individual must:

(1) meet the requirements in Subchapter A of this chapter (relating to Administration of Occupational Licenses and Registrations); and

(2) pass the applicable examination.

(b) Effective January 1, 2010, the installer license will no longer be valid and will be replaced by an irrigation technician license. No new installer license applications will be accepted after June 1, 2009. New installer licenses issued after the effective date of these rules will remain valid through December 31, 2009. The fee for initial installer licenses issued after the effective date of these rules will be prorated to reflect the validity period.

(c) To obtain an irrigator license, an individual must:

(1) meet the requirements in Subchapter A of this chapter (relating to Administration of Occupational Licenses and Registrations);

(2) complete and pass the basic irrigator training course; and

(3) pass all sections of the applicable examination.

(d) To obtain an irrigation technician license, an individual must:

(1) meet the requirements in Subchapter A of this chapter;

(2) complete the basic irrigation technician course; and

(3) pass the applicable examination.

(e) To obtain an irrigation inspector license, an individual must:

(1) meet the requirements in Subchapter A of this chapter.

(2) successfully complete:

(A) the basic irrigator training course;

(B) an approved backflow prevention assembly testing training course; and

(C) an approved water conservation or water audit course; or

(D) an approved landscape irrigation inspection course.

(3) pass the applicable examination.

(f) An individual is ineligible to obtain an irrigation inspector license if the individual engages in or has financial or advisory interest in an entity that:

(1) sells, designs, installs, maintains, alters, repairs, or services an irrigation system;

(2) provides consulting services relating to an irrigation system; or

(3) connects an irrigation system to any water supply.

§30.122. Qualifications for License Renewal.

(a) To renew an installer license that expires prior to June 1, 2009, an individual must meet the requirements in Subchapter A of this chapter (relating to Administration of Occupational Licenses and Registrations).

(b) Effective January 1, 2010, the installer license will no longer be valid and will be replaced by an irrigation technician license. No installer license renewal applications will be accepted after December 31, 2008.

(c) Installer licenses renewed after the effective date of these rules, but prior to June 1, 2009, will remain valid until December 31, 2009. The fee for installer licenses renewed after the effective date of these rules will be prorated to reflect the validity period.

(d) To renew an irrigator license, an individual must:

(1) meet the requirements in Subchapter A of this chapter; and

(2) complete 24 hours of approved training credits.

(e) To renew an irrigation technician license, an individual must:

(1) meet the requirements in Subchapter A of this chapter; and

(2) complete 16 hours of approved training credits.

(f) To renew an irrigation inspector license, an individual must:

(1) meet the requirements in Subchapter A of this chapter; and

(2) complete 24 hours of approved training credits.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

SUBCHAPTER L. ON-ROAD ENGINES

DIVISION 1. HEAVY-DUTY DIESEL ENGINES

30 TAC §§114.700 - 114.702, 114.706, 114.707, 114.709

The Texas Commission on Environmental Quality (commission or TCEQ) adopts the repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1741) *without changes* and will not be republished.

The commission will submit a request to the United States Environmental Protection Agency (EPA) to withdraw these repealed sections from consideration for approval in the State Implementation Plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEAL

In 1998, the federal government and seven heavy-duty diesel engine (HDDE) manufacturers entered into consent decrees after enforcement actions were brought against HDDE manu-

facturers that a majority of the diesel engine manufacturers had programmed their engines to defeat federal test procedures (FTP) which were established to measure compliance with the EPA promulgated diesel emission standards in effect at the time. A so-called "defeat device" was employed because its use would provide some increase in fuel economy. However, its use would also cause the engine to produce higher nitrogen oxides (NO_x) emissions while the engine was running in the open-road or cruise mode.

In the consent decrees, the manufacturers were required, among other things, to produce HDDE that met a 2.5 gram per brake horsepower-hour standard for non-methane hydrocarbons plus NO_x emissions by no later than October 1, 2002. The consent decrees also required the manufacturers to comply with supplemental test procedures for a period of two years (2003 and 2004). The two components of the supplemental tests are known as the "Not to Exceed" (NTE) test and the Euro III European Stationary Cycle test. However, the EPA's NTE rules for HDDE that would include the NTE test requirements were delayed until model year 2007. This delay resulted in a regulatory gap for two model years (2005 and 2006) between the expiration for the NTE test requirements under the consent decree following model year 2004 and the commencement of NTE test requirements for model year 2007. To prevent any "backsliding" by HDDE manufacturers during the 2005 and 2006 model years, the California Air Resources Board (CARB) adopted rules under Title 13, California Code of Regulations (13 CCR) §1956.8 on December 8, 2000. The rules were effective on July 25, 2001, requiring HDDE manufacturers to comply with supplemental procedures including the NTE test.

The TCEQ originally adopted the rules under 30 TAC Chapter 114, Subchapter L in August 2001 to join with California and twelve other states to prevent potential significant increases in diesel exhaust emissions due to possible "backsliding" by engine manufacturers because of the absence of federal standards during the 2005 and 2006 model years. The EPA's implementation of federal emission control standards (66 Federal Register 5001, January 18, 2001) including NTE standards, for 2007 and newer model year HDDE and heavy-duty on-highway (HDOH) vehicles, i.e., motor vehicles with a gross vehicle weight rating of greater than 8500 pounds, mitigates the original justification for Texas to require CARB-certified HDDE. These federal standards now require HDDE manufacturers to meet emission limits for 2007 and newer HDDE and HDOH vehicles that are equivalent to the California standards required under Subchapter L.

On June 27, 2007, the commission directed staff to initiate rulemaking after consideration of a petition from the Engine Manufacturers Association (EMA) to repeal Subchapter L and the executive director's subsequent analysis in support for repealing these rules.

The current regulations under Subchapter L require all HDDE produced for sale or other use in Texas for the 2005 and newer model years to be certified to meet the California emission control standards specified under 13 CCR §1956.8 that were revised by CARB on December 8, 2000, and effective on July 25, 2001. The EMA petition requested the TCEQ to initiate rulemaking to repeal Subchapter L to allow for the sale or other use in Texas of any 2008 or newer model year HDDE that are certified by the EPA as compliant with all applicable EPA emission control regulations.

The EMA states that revisions by CARB to 13 CCR §1956.8 effective on November 15, 2006, enacting additional emission control requirements for automatic engine idle shutdown devices on 2008 and newer model year HDDE impact the validity of TCEQ's current regulations under Subchapter L since these rules are no longer consistent with California's new rules. The EMA contends that subsequent implementation of TCEQ's regulations under Subchapter L may be construed as a violation of the identicality (i.e., "no third car") requirement in Section 177 of the Clean Air Act (42 United States Code (USC), §7507).

Section 177 of the Clean Air Act (42 USC, §7507) allows states to adopt and implement vehicle and engine emission standards that are more stringent then federal requirements if the standards are identical to the California standards for which a waiver has been granted by the EPA for the model years affected by the standards. However, this section prohibits states from taking "any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."

SECTION BY SECTION DISCUSSION

The repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 removes regulations that have been rendered unnecessary by the EPA's implementation of federal emission control standards (66 *Federal Register* 5001, January 18, 2001), including NTE standards, for 2007 and newer model year HDDE and HDOH vehicles that require HDDE manufacturers to meet emission limits that are equivalent to the California standards that were required under §§114.700 - 114.702, 114.706, 114.707, and 114.709. Repealing these sections provides regulatory flexibility by allowing persons selling or offering to sell new HDDE and HDOH vehicles in Texas with the option of selling new 2008 and newer HDDE and HDOH vehicles that are either certified by the EPA or by CARB, while having no significant impact on air quality. In addition, the repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 eliminates the potential violation of the identicality (i.e., "no third car") requirement in Section 177 of the Clean Air Act (42 USC, §7507) that might occur if the TCEQ enforced the rules specified under §§114.700 - 114.702, 114.706, 114.707, and 114.709 to require 2008 and newer model year HDDE and HDOH vehicles to be certified to meet the California emission control standards referenced by these rules.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking to repeal §§114.700 - 114.702, 114.706, 114.707, and 114.709 considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking did not meet the definition of a "major environmental rule." A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific purpose of this rulemaking is to repeal the heavy duty diesel engine requirements in state rule because these have been rendered unnecessary by the EPA's implementation of federal emission control standards. The repeal itself does not specifically protect human health or the environment, or adversely affect materially the economy, productivity, competition, jobs, etc. Therefore, the repeal does not constitute a major environmental rule, and thus was not subject to a formal regulatory analysis.

In addition, the repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the repeal does not meet any of the four applicability requirements. Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

Specifically, this rulemaking action, which is designed to repeal provisions in state rule that have potentially become prohibited by federal law due to changes to CARB rules initially incorporated by reference in state rule, does not exceed an express requirement under state or federal law. Furthermore, there is no contract or delegation agreement that covers the topic that is the subject of this action. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.012, 382.017, 382.019, and 382.208. Therefore, the repeal does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor was adopted solely under the general powers of the agency.

Based on the foregoing, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). The commission invited public comment on the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or by Article 1, Texas Constitution, §17 or §19; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The specific purpose of this rulemaking is to repeal §§114.700 - 114.702, 114.706, 114.707, and 114.709, which provides regulatory flexibility by allowing persons selling or offering to sell new HDDE and HDOH vehicles in Texas with the option of selling new 2008 or newer HDDE and HDOH vehicles that are either certified by the EPA or by CARB, while having no significant impact on the regulated emissions currently affected by these rules. The repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709 does not place a burden on private, real property in a manner that will require compensation to private real property owners under the United States Constitution or the Texas Constitution. The repeal also does not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the repeal does not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined this rulemaking related to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the repeal is consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. The repeal complies with 40 Code of Federal Regulations (CFR) Part 50, National Primary and Secondary Air Quality Standards, and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. This rulemaking action is consistent with CMP goals and policies, in compliance with 31 TAC §505.22(e).

PUBLIC COMMENT

A public hearing on this repeal was held in Austin on March 20, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201s. The commission did not receive any oral comments at the public hearing.

The public comment period for this repeal closed on March 26, 2008. The commission received written comments from the Engine Manufacturers Association (EMA), Environmental Defense Fund (EDF), City of Houston (Houston), Greater Houston Partnership (GHP), Houston-Galveston Area Council (HGAC), North Central Texas Council of Governments (NCTCOG), Houston Regional Group of the Sierra Club (Sierra Club), and the United States Environmental Protection Agency (EPA).

RESPONSE TO COMMENTS

The EDF, GHP, HGAC, Houston, NCTCOG, and Sierra Club opposed the proposed repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709. The EDF, Houston, NCTCOG, and Sierra Club commented that the commission should revise its current rules to adopt California's new 13 CCR §1956.8 rules that require automatic engine idle shut-down devices on 2008 and newer model year HDDE. The GHP and HGAC commented that the commission should take no action to repeal its current HDDE rules until a more complete analysis of the potential costs to consumers and emission reduction benefits of implementing the California rules requiring automatic engine idle shut-down devices in HDDE has been conducted, or alternatively the commission

should amend its current rules to include the more stringent California standards.

California's amended 13 CCR §1956.8 rule will require automatic engine idle shut-down devices on 2008 and newer model year HDDE that activate after five minutes of continuous idling operation, with no exceptions made for idling while a driver is using the vehicle's sleeper berth for a government-mandated rest period. THSC, §382.0191, prohibits the commission from prohibiting or limiting the idling of a motor vehicle when idling is necessary to power a heater or air conditioner while a driver is using the vehicle's sleeper berth for a government-mandated rest period. Therefore, the commission cannot adopt California's new 13 CCR §1956.8 rules by reference as requested by these commenters; or cannot do so without adding significant limitations to correspond to the THSC. Such an option was not proposed and published for public comment. In addition, the federal HDDE standards that will be in effect in Texas after repeal of this rule will result in the same NOx reductions as the repealed rule. The commission notes that this repeal does not prevent future consideration of similar idling restrictions once THSC, §382.0191 expires on September 1, 2009, and if reductions are found to be necessary and reasonably available for SIP purposes. The commission has made no changes in response to these comments.

The EMA supported the proposed repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709, and commented that the proposed rulemaking properly recognizes that the Texas regulations have been rendered unnecessary by the EPA's implementation of stringent federal emission control standards, including strict NTE standards for 2007 and newer model year HDDE and HDOH vehicles, which are equivalent to the California standards originally adopted by the commission. The EMA also commented that the proposed rulemaking recognizes that the rationale for adopting the California standards originally adopted by the commission no longer pertains and that the continued enforcement of the commission's HDDE rules would likely violate the identicality requirement of the federal Clean Air Act.

The commission acknowledges the EMA's support of this rulemaking.

The EPA did not oppose the repeal of §§114.700 - 114.702, 114.706, 114.707, and 114.709, based on the reasons stated in the proposal and commented that the commission should consider withdrawing the NTE rules previously submitted to the EPA as a SIP submittal under a letter dated July 15, 2002. The EPA commented that withdrawing these rules would save resources in both agencies, i.e., the commission submitting repealed rules and the EPA processing two SIP submittals that have no net benefit.

The commission acknowledges the EPA's support of this rulemaking. The commission will send a letter to the EPA withdrawing the repealed 30 TAC §§114.700 - 114.702, 114.706, 114.707, and 114.709 rules from consideration for approval in the SIP revision previously submitted to the EPA on July 15, 2002, since the rules are no longer applicable.

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code. The repeals are also adopted under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.019, concerning Methods Used to Control and Reduce Emissions from Land Vehicles, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and THSC, §382.208, concerning Attainment Program, which authorizes the commission to coordinate with federal, state and local transportation planning agencies to develop and implement programs and other measures necessary to protect the public from exposure to hazardous air contaminants from motor vehicles.

The adopted repeals implement TWC, §5.103 and §5.105, and THSC, §§382.002, 382.011, 382.012, 382.017, 382.019, and 382.208.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 337. DRY CLEANER ENVIRONMENTAL RESPONSE

The Texas Commission on Environmental Quality (commission or agency) adopts the amendments to §§337.3, 337.4, 337.11, 337.13, 337.14, 337.31, 337.32, and 337.51. The commission also adopts new §§337.16 - 337.18, 337.52, 337.53, and 337.64.

Sections 337.3, 337.4, 337.14, 337.16, 337.18, 337.31, 337.32, 337.51, 337.53, and 337.64 are adopted *without changes* to the proposed text as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1260) and will not be republished. Sections 337.11, 337.13, 337.17, and 337.52 are adopted *with changes* to the proposed text and will be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted rules is to implement House Bill (HB) 3220, 80th Legislature, 2007, and to provide for more efficient administration and enforcement of Texas Health and Safety Code (THSC), Chapter 374. HB 3220 revises statutes relating to the dry cleaner environmental response program created by the 78th Legislature, 2003, and codified in THSC, Chapter 374. HB 3220 amends THSC, §§374.102 - 374.104, 374.154, and 374.207. HB 3220 also adds the following new sections to THSC, Chapter 374: §§374.1022 - 374.1023, and 374.1535. HB

3220 establishes new requirements for registration of dry cleaner property owners and preceding property owners who wish to obtain eligibility for Dry Cleaning Facility Release Fund (Fund) benefits. Additionally, the bill allows an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status. The bill also prohibits the use of perchloroethylene at sites where the commission has completed corrective action. In addition to rule changes adopted for the purpose of implementing these provisions of HB 3220, certain rule changes are being adopted for the purpose of more efficient administration and enforcement of THSC, Chapter 374. These include: a provision prohibiting a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for an unregistered dry cleaning facility or for a dry cleaning drop station; provisions expanding the basis of and procedures for revocation or denial of a dry cleaner or distributor registration certificate; a provision clarifying that annual registration fee billing dates are established by the executive director; a provision requiring that once corrective action under the Fund has begun at a site, the site must remain in the Dry Cleaner Remediation Program (Program) until corrective action is completed at the site; a provision prohibiting the use of perchloroethylene at a site once corrective action under the Fund has begun at that site, and providing for a written notice of the prohibition to be placed in county deed records; and additional definitions, a section title change, and other changes to phrasing made for the purpose of clarity and for the purpose of consistency within the rule, as well as between the rule and THSC, Chapter 374.

SECTION BY SECTION DISCUSSION

The commission adopts amendments to Chapter 337, Dry Cleaner Environmental Response, to establish the procedures to administer and enforce HB 3220, and to provide for more efficient administration and enforcement of THSC, Chapter 374.

The commission adopts an amendment to §337.3, Definitions, to add definitions for Property Owner and Preceding Property Owner. The additional definitions are necessary to clarify that the meaning of these terms is consistent with the meaning set out in THSC, §374.1022. Renumbering of two additional definitions will be necessary in order to accommodate this change.

The commission adopts an amendment to §337.4, General Prohibitions and Requirements, to clarify, in §337.4(b), that a dry cleaning facility must have a registration certificate issued pursuant to §337.11 in order for a distributor to distribute dry cleaning solvent to the facility. The purpose of this change is to distinguish a registration certificate issued pursuant to §337.11, which qualifies a facility to receive dry cleaning solvent, from a registration certificate issued pursuant to the newly adopted §337.17, which does not qualify a facility to receive dry cleaning solvent. In addition, §337.4(h) is adopted to prohibit a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for a dry cleaning facility unless the facility has a registration certificate issued pursuant to §337.11. Finally, §337.4(i) is adopted to prohibit a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for a dry cleaning drop station. Subsections (h) and (i) are amended to allow for enforcement in the event that persons, in addition to distributors, obtain solvent for drop stations or unregistered dry cleaning facilities.

The commission adopts an amendment to §337.11, Dry Cleaner Registration Certificates, to expand the basis of and procedures for revocation or denial of a dry cleaner registration certificate. With this amendment, the basis for revocation or denial of a dry cleaner registration certificate becomes more consistent with the basis for revocation or denial that is set out in other agency rules, such as the rules applicable to the Petroleum Storage Tank program. In addition, the expanded basis of and procedures for revocation or denial of a dry cleaner registration certificate will allow needed flexibility for revocation or denial of a certificate based on circumstances other than the very limited ones contemplated by the existing rule. For example, the adopted amendment would allow the commission to revoke a dry cleaner registration certificate in the event that a facility owner fails to respond to the executive director upon initiation of an enforcement action, by neglecting to pay penalties assessed and/or to take measures necessary to correct the violation that resulted in the enforcement action. Finally, the amendment to §337.11(f)(1)(C) is adopted with change from proposal by replacing "constitutes" with "to be." This change is made in order to improve readability.

The commission adopts an amendment to §337.13, Distributor Registration Certificate, to expand the basis of and procedures for revocation or denial of a distributor registration certificate. With this amendment, the basis for revocation or denial of a distributor registration certificate becomes more consistent with the basis for revocation or denial that is set out in other agency rules, such as the rules applicable to the Petroleum Storage Tank program. In addition, the expanded basis of and procedures for revocation or denial of a distributor registration certificate will allow needed flexibility for revocation or denial of a certificate based on circumstances other than the very limited ones contemplated by the existing rule. For example, the adopted amendment would allow the commission to revoke a distributor registration certificate in the event that a distributor fails to respond to the executive director upon initiation of an enforcement action, by neglecting to pay penalties assessed, and/or to take measures necessary to correct the violation that resulted in the enforcement action. Also, in §337.13(e)(4)(A) the word "owner" is replaced with the word "distributor" in order to clarify that this section, which pertains to distributor registration certificates, sets out the appeal process applicable to distributors rather than to owners. Additionally, the amendment to §337.13(e)(1)(C) is adopted with change from proposal by replacing "constitutes" with "to be" in order to improve readability. Finally, §337.13(e)(2) is adopted with change from proposal to include the word "this" to clarify which subsection is applicable.

The commission adopts an amendment to §337.14, Registration Fees, to add, "for Dry Cleaning Facilities and Drop Stations" to the section title. This is to differentiate this section from §337.18, the new property owner and preceding property owner registration fee section. In addition, §337.14(c) is also amended to clarify that the annual registration fee may be divided into quarterly payments and billed on dates established by the executive director. This change is adopted to clearly state the authority of the executive director to establish annual registration fee billing dates. Finally, §337.14(c) is amended to delete the phrase, "of registration fees" to improve readability.

New §337.16, Registration by Property Owner or Preceding Property Owner, sets forth the registration requirements for property owners and preceding property owners. All owners and preceding owners of real property on which a dry cleaning facility or drop station is or was located, who wish to obtain eligibility for Fund benefits, must be registered with the commission in accordance with THSC, §374.1022. This section sets out the required registration procedures, including when to register, how to register, when to update information, and who may complete and submit registration forms.

New §337.17, Property Owner or Preceding Property Owner Registration Certificate, sets forth the procedures related to registration certificates for property owners or preceding property owners, including obtaining and displaying a certificate, as well as the process for revocation or denial of a certificate. A property owner or preceding property owner must have a valid registration certificate issued pursuant to this section in order to apply for corrective action under the Fund. In addition, the amendment to §337.17(d)(1)(C) is adopted with change from proposal by replacing "constitutes" with "to be." This change is made in order to improve readability.

New §337.18, Registration Fees for Property Owners and Preceding Property Owners, sets forth the procedures and requirements for property owners and preceding property owners to pay the registration fees required by THSC, §374.1022. The annual registration fee may be divided into quarterly payments and billed on dates established by the executive director. However, past annual registration and late fees must be paid in full at the time of registration and may not be divided into quarterly payments. The adopted rule also requires payment of penalties and interest in accordance with 30 TAC Chapter 12, Payment of Fees, for payments that are not made by the due date. Registration certificates will not be issued until all registration and any late fees due pursuant to THSC, §374.1022, in addition to any penalties and interest assessed, are paid in full. The adopted rule requires that a property owner or preceding property owner who has registered a site pursuant to §337.16 must continue to pay annual registration fees in accordance with THSC, §374.1022 for the duration of corrective action at the site under the Fund.

The commission adopts an amendment to §337.31, Ranking of Sites, by deleting the phrase, "including former owners of dry cleaning facilities and owners of real property on which a dry cleaning facility was formerly located that meet the eligibility criteria" from §337.31(a)(2). This change is adopted for the sake of consistency within the rule, as well as between the rule and THSC, Chapter 374.

The commission adopts an amendment to §337.32, Denial and Removal of Sites from Ranking, by deleting the phrase, "for any dry cleaning facility or dry cleaning drop station" and adding the phrase, "pursuant to this chapter" in §337.32(a)(3). These changes are adopted for the purpose of consistency within the rule, as well as between the rule and THSC, Chapter 374.

The commission adopts an amendment to §337.51, Eligibility for Corrective Action, by deleting the phrase, "for any dry cleaning facilities or dry cleaning drop station that the person owns" from §337.51(3). This change is adopted for the purpose of clarity and for consistency within the rule, as well as between the rule and THSC, Chapter 374.

New §337.52, Site Restrictions Upon Commencement of Corrective Action, is adopted with changes from the proposed text. Section 337.52 prohibits the use of perchloroethylene at sites where corrective action has begun under the Fund. Section 337.52 also provides that a written notice of the prohibition will be filed in county deed records following the commencement of corrective action under the Fund. The commission considers corrective action to have commenced once a site has been prioritized pursuant to 30 TAC §337.30 and Program costs have been incurred at the site. The purpose of this adopted rule is to implement THSC, §374.1535, and to reduce the possibility of further contamination from the dry cleaning solvent perchloroethylene at a site that is being addressed under the Fund. As originally proposed, this rule provided that, following the completion of corrective action under Chapter 337, a notice would be filed in the real property records of the county or counties in which the site was located, notifying future property owners that, pursuant to THSC, §374.1535, perchloroethylene may not be used at that site. The change from the proposed version is made after consideration of public comment in favor of the change and in recognition of the importance of preventing further contamination from the dry cleaning solvent perchloroethylene to sites that are being addressed under the Fund. Due to its toxicity, mobility, and tendency to sink in the subsurface and thereby enter groundwater, perchloroethylene poses a significant environmental concern and often results in higher assessment and response costs compared to other solvents. Additional releases of perchloroethylene, while corrective action is ongoing, unnecessarily prolongs the corrective action process and limits the funds available to address contamination at other dry cleaning sites. Therefore, preventing further perchloroethylene contamination to sites being addressed under the Fund promotes the efficiency of corrective action efforts at such sites and helps to ensure responsible management of the Fund.

New §337.53, Withdrawal of Site from the Dry Cleaner Remediation Program, sets forth the requirement that once corrective action costs have been incurred at a site by the Program, an applicant may not withdraw the site from the Program prior to completion of corrective action at the site. Exceptions to this requirement may be allowed upon approval of the executive director in the event that corrective action has been suspended, postponed, or terminated at a site in accordance with §337.30 or §337.50. This rule is adopted for the purpose of ensuring that, when Fund money has been expended at a site, that site remains in the Program until corrective action is complete. By ensuring that Fund money is expended for complete, rather than partial, corrective action measures, this rule maximizes the effectiveness of corrective action under the Fund and promotes the responsible management of the Fund.

New §337.64, Retaining Nonparticipating Status for a Drop Station Moved to a New Location, sets forth the procedures and requirements for drop station owners who move a drop station to a new location to be able to retain the drop station's nonparticipating status. The adopted rule requires that the owner submit the same type of documentation for the new location that was required for the original nonparticipating drop station, including property owner consent and an affidavit attesting that perchloroethylene has never been used at the new location and that the owner will not ever use or allow the use of perchloroethylene at the new location. The rule also states that a registration certificate issued for a nonparticipating drop station is valid for only one location. Once the drop station moves to a new location, the original site will no longer be considered nonparticipating.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of the adopted rules is to protect the environment or reduce risks to human health from environmental exposure, the adopted rules would not adversely affect, in a material way, the economy; a sector of the economy; productivity; competition; jobs; the environment; or the public health and safety of the state or a sector of the state.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

The adopted rules implement HB 3220, which amends THSC, Chapter 374. The adopted rules also include certain amendments to Chapter 337, which are adopted for the purpose of more effective administration and enforcement of THSC, Chapter 374. THSC, Chapter 374 addresses the environmental regulation and remediation program for dry cleaning facilities and dry cleaning drop stations. Under the program, certain dry cleaners pay registration and solvent fees into a fund that is then used by the commission to investigate and clean up eligible contaminated dry cleaning sites. Contamination from dry cleaning facilities is a real and substantial threat to public health and safety, and the legislation and adopted rules respond to this threat in three ways. First, the legislation and adopted rules respond to the threat of contamination by requiring that property owners and preceding property owners who wish to apply for a site to be addressed under the Fund must pay an annual registration fee prior to applying and must continue to pay an annual fee for the duration of corrective action under the Fund. This requirement is expected to increase the amount of money in the Fund, thereby maximizing the number of contaminated dry cleaning sites within the state that can be addressed under the Fund. Second, the adopted rules respond to the threat of contamination by prohibiting the use of perchloroethylene at sites once corrective action has begun under the Fund and by providing that, following the commencement of corrective action under the Fund, a notice will be filed in the real property records of the county or counties in which the site is located to notify future property owners that perchloroethylene may not be used at that site. This prohibition alleviates the possibility of further contamination from the dry cleaning solvent perchloroethylene at a site that is being addressed or that has been addressed under the Fund. Third, the rules respond to the threat of contamination by prohibiting a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for an unregistered dry cleaning facility or for a dry cleaning drop station. The legislation and rules do not allow such facilities to obtain dry cleaning solvent, and providing for enforcement against any person who circumvents the rules in this way will help to advance the legislation's purpose of preserving, protecting, and maintaining the water and other natural resources of this state.

The adopted rules significantly advance a health and safety purpose by providing the framework within which the commission processes property owner and preceding property owner registrations, and collects the funds for corrective action, so that those funds can be utilized to address health and safety concerns at sites around the state. Furthermore, as previously discussed, the adopted rules significantly advance a health and safety purpose by prohibiting the use of perchloroethylene at sites while they are being addressed under the Fund, implementing the statutory prohibition against the use of perchloroethylene at sites that have been addressed under the Fund, and by providing for written notice of the prohibition. In addition, the adopted rules significantly advance a health and safety purpose by providing an additional enforcement mechanism in the event that a person obtains dry cleaning solvent for drop stations or unregistered dry cleaning facilities. Finally, the adopted rules significantly advance a health and safety purpose by requiring that, once corrective action costs have been incurred at a site by the Program, an applicant may not withdraw the site from the Program prior to completion of corrective action at the site. Exceptions to this requirement may be allowed upon approval of the executive director in the event that corrective action has been suspended, postponed, or terminated at a site in accordance with §337.30 or §337.50. This rule ensures that, when Fund money has been expended at a site, that site remains in the Program until corrective action is complete. By ensuring that Fund money is expended for complete, rather than partial, corrective action measures, this rule maximizes the effectiveness of corrective action under the Fund and promotes the responsible management of the Fund.

The adopted rules are narrowly tailored to implement HB 3220 and provide for more efficient administration and enforcement of THSC, Chapter 374, and do not impose a greater burden than is necessary to achieve the health and safety purpose as previously stated.

Nevertheless, the commission further evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to implement HB 3220 and to provide for more efficient administration and enforcement of THSC, Chapter 374 by setting forth: 1) procedures governing registration and certificates for, and collection of fees from, property owners and preceding property owners who wish to obtain eligibility for Fund benefits; 2) procedures allowing an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status; 3) the provision that, once corrective action under the Fund has begun at a site, perchloroethylene may not be used at that site, and providing for written notice of the prohibition; 4) a provision prohibiting a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for an unregistered dry cleaning facility or for a dry cleaning drop station; 5) amended procedures for revocation or denial of a dry cleaner or distributor registration certificate; 6) clarified procedure for administration of dry cleaning facility and drop station registration fee billing and payment; 7) a prohibition against withdrawal of a site from the Program once the Program has incurred corrective action costs at the site; and 8) two additional definitions, one section title change, and other similar changes to phrasing made for the purpose of clarity and for the purpose of consistency within the rule, as well as between the rule and THSC, Chapter 374.

Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the adopted rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the adopted rules. For example, although §337.52 of the adopted rules prohibits the use of perchloroethylene at a site once corrective action under the Fund has begun at that site,

this prohibition only arises when Fund money is spent to remediate property contaminated by dry cleaning solvent. Rather than representing a burden to property, such remediation enhances the value of an otherwise contaminated property. Furthermore, HB 3220 imposes the prohibition against the use of perchloroethylene at a site subject to commission corrective action under the Fund. This statutory prohibition exists independently of the adopted rule. Section 337.52 simply implements the prohibition earlier in time, at the beginning of corrective action, in order to prevent a recurrence of contamination while corrective action under the Fund is ongoing.

The adopted rules implement HB 3220 and provide for more efficient administration and enforcement of THSC, Chapter 374. As explained above, these adopted rules do not constitute a taking of private real property and the benefits to society are the adopted rules' specific procedures and requirements for a program that addresses dry cleaning contamination and seeks to prevent future contamination.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature as it pertains to the CMP, and will have no substantive effect on commission actions subject to the CMP, and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

PUBLIC COMMENT

A public hearing on the proposed rules was held in Austin, Texas, on March 11, 2008. The public comment period ended at 5:00 p.m. on March 17, 2008. No comments were received at the public hearing. One written comment was received from Representative Gary Elkins during the 30-day comment period. Addressing the commission's solicitation of comments regarding a rule that would prohibit the use of perchloroethylene at the beginning of corrective action under the Fund, Representative Elkins's comment expressed support for a rule prohibiting the use of perchloroethylene at a point in time earlier than expressly required by statute.

RESPONSE TO COMMENTS

Representative Gary Elkins commented, with regard to §337.52, that he has received many comments stating that prohibiting perchloroethylene only after corrective action is complete "is not the best policy and does not adequately support the best use of limited remediation funds." Representative Elkins expressed support for the prohibition on the use of perchloroethylene earlier in time than expressly required by HB 3220.

The commission agrees with Representative Elkins's comment supporting the prohibition on perchloroethylene earlier in time than expressly required by HB 3220. After soliciting comments on such a change and receiving no comments in opposition, the commission has changed the rule language to prohibit the use of perchloroethylene at a site once corrective action has begun under the Fund, and to provide for a written notice of this prohibition to be placed in the county deed records following commencement of corrective action under the Fund. This change is consistent with THSC, §374.051, which states that rules adopted by the commission under that section "must be reasonably necessary to preserve, protect, and maintain the water and other natural resources of this state;" and must be reasonably necessary "to provide for prompt and appropriate corrective action of releases from dry cleaning facilities." The dry cleaning solvent perchloroethylene, due to its toxicity, mobility, and tendency to sink in the subsurface and thereby enter groundwater, poses a significant environmental concern and often results in higher assessment and response costs compared to other solvents. The continued use of perchloroethylene at sites while they are being addressed under the Fund presents the risk of further perchloroethylene contamination to such sites. This risk runs counter to the goal of preserving, protecting, and maintaining the water and natural resources of this state. Further, additional releases of perchloroethylene while corrective action is ongoing unnecessarily prolongs the corrective action process and limits the funds available to address contamination at other dry cleaning sites. Given the above considerations, the commission adopts §337.52, prohibiting the use of perchloroethylene at sites once corrective action has begun under the Fund, and providing for a written notice of this prohibition to be placed in county deed records following the commencement of corrective action under the Fund.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §337.3, §337.4

STATUTORY AUTHORITY

The amended sections are adopted under the authority granted to the commission by the 80th Legislature in Texas Health and Safety Code (THSC), Chapter 374. The amended sections are also adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and HB 3220, 80th Legislature, 2007.

The adopted amended sections implement THSC, Chapter 374.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. REGISTRATION, CERTIFICATES, AND FEES

30 TAC §§337.11, 337.13, 337.14, 337.16 - 337.18

STATUTORY AUTHORITY

The amended and new sections are adopted under the authority granted to the commission by the Texas Legislature in Texas Health and Safety Code (THSC), Chapter 374. The amended and new sections are also adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and HB 3220, 80th Legislature, 2007.

The adopted amended and new sections implement THSC, Chapter 374.

§337.11. Dry Cleaner Registration Certificates.

(a) Before the executive director evaluates a registration to determine if a registration certificate should be issued, each registration must be administratively complete. A registration is not administratively complete if:

(1) the registration form has not been completed and submitted to the agency in accordance with this chapter;

(2) the registration form does not contain all requested information with clear, legible, and true responses;

(3) all fees, penalties, and interest owed to the agency have not been paid; or

(4) the comptroller reports to the executive director that the owner is not in good standing with the state or that the owner's application information does not agree with the comptroller's information. However, if the comptroller does not respond to the agency's request for verification within three business days in accordance with Texas Health and Safety Code, §374.102(f), the executive director shall not be prohibited from determining that the registration is administratively complete.

(b) Upon the executive director's determination that a submitted registration is administratively complete, a registration certificate will be issued for the dry cleaning facility or dry cleaning drop station, as applicable, as long as the executive director has no reason to deny the registration certificate under this section. This certificate is necessary to receive the delivery of dry cleaning solvents under §337.4(b) of this title (relating to General Prohibitions and Requirements).

(c) The agency's issuance of a registration certificate for a dry cleaning facility or dry cleaning drop station does not constitute agency certification or affirmation of the compliance status of the location in question with this chapter, the Texas Water Code, or the Texas Health and Safety Code; and this issuance does not preclude the agency from investigating these locations and pursuing enforcement actions when apparent violations are discovered.

(d) Certificate availability.

(1) The owner of a dry cleaning facility or dry cleaning drop station shall make available to a person delivering dry cleaning solvent a valid, current agency registration certificate for that establishment before the delivery of dry cleaning solvent can be made or accepted.

(2) The owner of the dry cleaning facility or drop station shall immediately display, upon request by agency staff, a valid, current agency registration certificate for that establishment.

(3) The dry cleaning facility or dry cleaning drop station owner shall ensure that a valid, current agency registration certificate is displayed at a facility or drop station. The original registration certificate must be posted in a public area where the document is clearly visible.

(4) In the event of the sale of a dry cleaning facility or a dry cleaning drop station, the previous owner's valid, current certificate may be used to purchase dry cleaning solvent for 30 days after the effective date of sale.

(e) Annual registration certificate renewal.

(1) The initial registration certificate issued for a dry cleaning facility or dry cleaning drop station will be valid until the expiration date indicated on that certificate. It is the responsibility of the owner to ensure that an application for renewal of that certificate is properly and timely submitted to the agency.

(2) A registration certificate is renewed by timely and proper submission of a new registration form to the agency. The agency will not issue a new registration certificate for registration forms that are determined by the executive director to be incomplete or inaccurate.

(3) A new registration form must be completed by the owner of a dry cleaning facility or dry cleaning drop station and submitted to the agency by August 1st of each year.

(f) Revocation or denial of a certificate by the executive director.

(1) The executive director may revoke or deny issuance of a certificate:

(A) if the certificate was acquired by fraud, misrepresentation, or knowing failure to disclose material information;

(B) if the owner of a dry cleaning facility or dry cleaning drop station is in violation of any of the requirements of this chapter or Texas Health and Safety Code, Chapter 374; or

(C) for any reason the executive director determines to be good cause for denial or revocation.

(2) Prior to revocation or denial of a certificate pursuant to this subsection, the executive director shall provide notice to the owner of the dry cleaning facility or dry cleaning drop station of the facts alleged to warrant revocation or denial. The notice must be in writing and sent via certified mail, return receipt requested. If the certified mail is returned to the executive director as unclaimed, notice is presumed to be received by the owner five days after mailing when:

(A) the notice was sent to the address indicated on the owner's most current registration; and

(B) the notice was sent simultaneously via first class mail, postage paid.

(3) The owner shall have 30 days after receipt of notice to demonstrate to the executive director whether or not compliance has been maintained with all requirements of law for the retention of the certificate. The executive director shall make a determination whether to revoke or deny the certificate and shall provide such determination in writing to the owner.

(4) The owner may appeal for commission review of the executive director's determination to revoke or deny a certificate pursuant to this subsection. An appeal must be in writing and filed by United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. The original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the owner must file with the Office of the Chief Clerk the original and 11 copies by mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the owner shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) An appeal filed under this subsection must:

(i) provide a copy of the owner's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this subsection is not a contested case for purposes of Texas Government Code, Chapter 2001.

(g) In addition to subsection (f) of this section, the executive director may seek to revoke a certificate by filing a petition in accordance with the procedures set forth in Chapter 70 of this title (relating to Enforcement) if the executive director determines that any of the reasons in subsection (f)(1) of this section exist.

(h) Revocation of a certificate under subsection (f) or (g) of this section is cumulative of any other remedies available to the agency by law.

§337.13. Distributor Registration Certificate.

(a) Completion of the dry cleaning solvent distributor report form. Upon the executive director's determination that a submitted dry cleaning solvent distributor report form has been completed in accordance with this chapter and that all fees, penalties, and interest owed to the agency have been paid, a distributor registration certificate will be issued for the place of business covered by that registration. This certificate is necessary for the delivery of dry cleaning solvent under §337.4 of this title (relating to General Prohibitions and Requirements).

(b) Incomplete or inaccurate dry cleaning solvent distributor report form or nonpayment. The executive director will not issue a distributor registration certificate for dry cleaning solvent distributor report forms determined by the executive director to be incomplete or inaccurate (including illegible or unclear information) or if any fees, penalties, or interest are owed to the agency. In order for a form to be complete, the form must contain all requested information with clear, legible, and true responses.

(c) Issuance of a registration certificate. The executive director's issuance of a registration certificate for a distributor does not constitute agency certification or affirmation of the compliance status of a location with this chapter, the Texas Water Code, or the Texas Health and Safety Code; or preclude the agency from investigating a location and pursuing enforcement action when apparent violations are discovered.

(d) Registration certificate availability.

(1) Prior to delivery of any dry cleaning solvent, a distributor shall make available to a person purchasing dry cleaning solvent a valid, current agency distributor registration certificate, or a legible copy of the certificate.

(2) A distributor shall immediately display, upon request by agency staff, a valid, current agency registration certificate for a place of business.

(3) A distributor shall display the original agency registration certificate at the place of business. The original registration certificate must be posted in a public area where the certificate is clearly visible.

(e) Revocation or denial of certificate by the executive director.

(1) The executive director may revoke or deny issuance of a certificate:

(A) if the certificate was acquired by fraud, misrepresentation, or knowing failure to disclose material information;

(B) if the distributor is in violation of any of the requirements of this chapter or Texas Health and Safety Code, Chapter 374, including late remittance of solvent fees and non-remittance of solvent fees; or

(C) for any reason the executive director determines to be good cause for denial or revocation.

(2) Prior to the revocation or denial of a certificate in accordance with this subsection, the executive director shall provide notice to the distributor of the facts alleged to warrant revocation or denial. The notice must be in writing and sent via certified mail, return receipt requested. If the certified mail is returned to the executive director as unclaimed, notice is presumed to be received by the distributor five days after mailing when:

(A) the notice was sent to the address indicated on the distributor's most current registration; and

(B) the notice was sent simultaneously via first class mail, postage paid.

(3) The distributor shall have 30 days after receipt of notice to demonstrate to the executive director whether or not compliance has been maintained with all requirements of law for the retention of the certificate. The executive director shall make a determination whether to revoke or deny the certificate and shall provide such determination in writing to the distributor.

(4) The distributor may appeal for commission review of the executive director's determination to revoke or deny a certificate pursuant to this subsection. An appeal must be in writing and filed by

United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. The original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the distributor must file with the Office of the Chief Clerk the original and 11 copies by mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the distributor shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) An appeal filed under this subsection must:

(i) provide a copy of the distributor's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this subsection is not a contested case for purposes of Texas Government Code, Chapter 2001.

(f) In addition to subsection (e) of this section, the executive director may seek to revoke a certificate by filing a petition in accordance with the procedures set forth in Chapter 70 of this title (relating to Enforcement) if the executive director determines that any of the reasons in subsection (e)(1) of this section exist.

(g) Revocation of a certificate under subsection (e) or (f) of this section is cumulative of any other remedies available to the agency by law.

§337.17. Property Owner or Preceding Property Owner Registration Certificate.

(a) Before the executive director evaluates a registration to determine if a registration certificate should be issued, each registration must be administratively complete. A registration is not administratively complete if:

(1) the registration form has not been completed and submitted to the agency in accordance with this chapter;

(2) the registration form does not contain all requested information with clear, legible, and true responses; or

(3) all fees, penalties, and interest owed to the agency have not been paid.

(b) Upon the executive director's determination that a submitted registration is administratively complete, a registration certificate will be issued to the property owner or preceding property owner, as applicable, for the site covered by the registration form, as long as the executive director has no reason to deny the registration certificate under this section. This certificate is necessary for a property owner or preceding property owner to apply for corrective action under the Dry Cleaning Facility Release Fund.

(c) A property owner or preceding property owner shall immediately display, upon request by agency staff, a valid agency registration certificate for a property.

(d) Revocation or denial of certificate by the executive director.

(1) The executive director may revoke or deny issuance of a certificate:

(A) if the certificate was acquired by fraud, misrepresentation, or knowing failure to disclose material information;

(B) if the property owner or preceding property owner is in violation of any of the requirements of this chapter or Texas Health and Safety Code, Chapter 374, including late remittance and non-remittance of fees; or

(C) for any reason the executive director determines to be good cause for denial or revocation.

(2) Prior to the revocation or denial of a certificate pursuant to this subsection, the executive director shall provide notice to the property owner or preceding property owner of the facts alleged to warrant revocation or denial. The notice must be in writing and sent via certified mail, return receipt requested. If the certified mail is returned to the executive director as unclaimed, notice is presumed to be received by the property owner or preceding property owner five days after mailing when:

(A) the notice was sent to the address indicated on the property owner or preceding property owner's most current registration; and

(B) the notice was sent simultaneously via first class mail, postage paid.

(3) The property owner or preceding property owner shall have 30 days after receipt of notice to demonstrate to the executive director whether or not compliance has been maintained with all requirements of law for the retention of the certificate. The executive director shall make a determination whether to revoke or deny the certificate and shall provide such determination in writing to the property owner or preceding property owner.

(4) The property owner or preceding property owner may appeal for commission review of the executive director's determination to revoke or deny a certificate pursuant to this subsection. An appeal must be in writing and filed by United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. The original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the property owner or preceding property owner must file with the Office of the Chief Clerk the original and 11 copies by mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the property owner or preceding property owner shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) The appeal filed under this subsection must:

(i) include a copy of the property owner or preceding property owner's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this subsection is not a contested case for purposes of Texas Government Code, Chapter 2001.

(e) In addition to subsection (d) of this section, the executive director may seek to revoke a certificate by filing a petition in accordance with the procedures set forth in Chapter 70 of this title (relating to Enforcement) if the executive director determines that any of the reasons in subsection (d)(1) of this section exist.

(f) Revocation of a certificate under subsection (d) or (e) of this section is cumulative of any other remedies available to the agency by law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 6, 2008.

TRD-200802915
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: June 26, 2008
Proposal publication date: February 15, 2008
For further information, please call: (512) 239-2548

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SUBCHAPTER D. PRIORITIZATION AND RANKING

30 TAC §337.31, §337.32

STATUTORY AUTHORITY

The amended sections are adopted under the authority granted to the commission by the Texas Legislature in Texas Health and Safety Code (THSC), Chapter 374. The amended sections are also adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and House Bill 3220, 80th Legislature, 2007.

The adopted amended sections implement THSC, Chapter 374.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 6, 2008.

TRD-200802916
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: June 26, 2008
Proposal publication date: February 15, 2008
For further information, please call: (512) 239-2548

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SUBCHAPTER F. CORRECTIVE ACTION

30 TAC §§337.51 - 337.53

STATUTORY AUTHORITY

The amended and new sections are adopted under the authority granted to the commission by the Texas Legislature in Texas Health and Safety Code (THSC), Chapter 374. The amended and new sections are also adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and House Bill 3220, 80th Legislature, 2007.

The adopted amended and new sections implement THSC, Chapter 374.

§337.52. Site Restrictions Upon Commencement of Corrective Action.

(a) Once corrective action under this chapter has begun at a site, perchloroethylene may not be used at that site.

(b) Following the commencement of corrective action under this chapter, a written notice will be filed in the real property records of the county or counties in which the site is located to notify future property owners that perchloroethylene may not be used at that site.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 6, 2008.

TRD-200802917
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: June 26, 2008
Proposal publication date: February 15, 2008
For further information, please call: (512) 239-2548

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SUBCHAPTER G. NON-PERCHLOROETHYLENE USERS, FACILITIES, AND DROP STATIONS

30 TAC §337.64

STATUTORY AUTHORITY

This new section is adopted under the authority granted to the commission by the Texas Legislature in Texas Health and Safety Code (THSC), Chapter 374. This new section is also adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and House Bill 3220, 80th Legislature, 2007.

The adopted new section implements THSC, Chapter 374.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 6, 2008.

TRD-200802918
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: June 26, 2008
Proposal publication date: February 15, 2008
For further information, please call: (512) 239-2548

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER CC. SEXUALLY ORIENTED BUSINESS FEE

34 TAC §3.722

The Comptroller of Public Accounts adopts new §3.722, concerning sexually oriented business fee, with changes to the proposed text as published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 64).

The new rule incorporates legislative changes in House Bill 1751, 80th Legislature, 2007, that amended Business and Commerce Code, Chapter 47. House Bill 1751 amended the Business and Commerce Code to impose on a sexually oriented business a fee for each entry by each customer admitted to the business. This new rule provides definitions, registration requirements, fee calculation, due date and reporting requirements and record requirements.

We received identical comments from the Texas Legal Services Center (TLSC) and Texas Association Against Sexual Assault (TAASA). Following is a summary of the comments received and the responses.

TLSC and TAASA asked that the rule include a de minimus exception from the fee for entities that do not regularly sponsor covered performances. We declined to do so because any such change to the rule would be contrary to Business and Commerce Code, §§47.051, 47.052 and 47.053.

TLSC and TAASA recommended that subsection (c)(3) be amended to delete the reference to wet t-shirt contests to describe a type of event subject to the fee even though the business hosting the event does not habitually engage in the activity described in (a)(3). We declined to make this change since the reference to a wet t-shirt contest is used as an example and therefore would be due only to the extent that this activity or other activities meet the requirements described in subsections (a)(2) and (a)(3).

TLSC and TAASA requested that we modify subsection (h) to require that any change made to original bookkeeping entries be duly noted as to the reason for change and a signed entry made to verify the reason for any changes in the original daily records. We declined to make this change because subsection (i) currently allows the comptroller to determine if accurate records are kept and to calculate the proper amount of fee due if accurate records are not kept.

The comptroller clarified in subsection (c)(1) how a sexually oriented business is to determine the amount of fee that is due from the sexually oriented business when there is more than one entry by the same customer on the same business day at the same location.

The comptroller clarified in subsection (c)(2) that a sexually oriented business that includes a separately stated charge for the fee on the customer check, but that does not clearly identify the charge as reimbursement is considered a tax collected from the customer and these amounts must be remitted to the comptroller in addition to the normal entry fee.

This new section is adopted under Tax Code, §111.002 and §111.0022, which provide the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The new section implements Business and Commerce Code, §§47.051, 47.052, 47.053, 47.054, and 47.056.

§3.722. Sexually Oriented Business Fee.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Customer--Any person on the premises of a sexually oriented business except:

(A) an owner, operator, independent contractor of the business or an employee of that sexually oriented business; or

(B) a person who is on the premises exclusively for repair or maintenance of the premises or for the delivery of goods to the premises.

(2) Nude--To be entirely unclothed, or clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.

(3) Sexually oriented business--A nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

(b) Questionnaire. A sexually oriented business, as defined in this section, is required to complete and submit a Texas sexually oriented business fee questionnaire on a form prescribed by the comptroller to file the report and remit the fee imposed under Business and Commerce Code, Chapter 47.

(c) Imposition and Calculation of Fee.

(1) A $5.00 fee is imposed on a sexually oriented business for each entry by each customer admitted to the business. In determining the amount of fee due by a sexually oriented business for more than one entry by the same customer on the same business day at the same location, it shall be presumed to have been one entry by the customer and the fee amount due from the business for the entry is $5.00. A business day begins when the business opens and continues until the close of business.

(2) A sexually oriented business has the discretion to determine how it will derive the money to pay the fee. All door and cover charges, including reimbursement of the sexually oriented business fee from its customers, are subject to sales tax as provided by Tax Code, Chapter 151. A sexually oriented business that chooses to recover the fee from its customer by including a separately stated charge for the fee on the customer check or invoice must clearly identify the charge as a reimbursement. A charge not clearly identified as reimbursement of the fee is considered a tax collected from the customer and these amounts must be remitted to the comptroller in addition to the $5.00 entry fee.

(3) A business that holds occasional events described in subsection (a)(3) of this section, but does not habitually engage in the activity described in subsection (a)(3) of this section is liable for the sexually oriented business fee for those occasional events. For example, a nightclub that hosts a wet t-shirt contest is liable for the fee based upon attendance during the event.

(d) Report forms. The sexually oriented business fee must be reported on a form as prescribed by the comptroller. The fact that the sexually oriented business does not receive the form or does not receive the correct form from the comptroller for the filing of the return does not relieve the business of the responsibility of filing a return and remitting the fee.

(e) Due date of report and payment.

(1) The sexually oriented business fee report and payment are due no later than the 20th day of the month following the calendar quarter month in which the liability for the fee is incurred.

(2) A sexually oriented business must file a quarterly report even if there is no fee to report.

(f) Penalty. Penalties due on delinquent fees and reports shall be imposed as provided by Tax Code, §111.061.

(g) Interest. Interest due on delinquent fees shall be imposed as provided by Tax Code, §111.060.

(h) Records required.

(1) A sexually oriented business is required to maintain records, statements, books, or accounts necessary to determine the amount of fee for which the business is liable to pay.

(2) A sexually oriented business shall record daily the number of customers admitted to the business. The manner in which a sexually oriented business maintains records of the number of customers admitted to the business may be written, stored on data processing equipment, or may be in any form that the comptroller may readily examine.

(3) The comptroller or an authorized representative has the right to examine any records or equipment of any person liable for the fee in order to verify the accuracy of any report made or to determine the fee liability in the event no return is filed.

(4) Records required by the comptroller must be kept for at least four years after the date on which the records are prepared. A business must make records available for inspection and audit on request by the comptroller.

(i) Failure to keep accurate records. If a sexually oriented business fails to keep accurate records of the number of customers admitted to the business the comptroller may estimate the amount of fee liability based on any available information that includes, but is not limited to, any reports required to be filed per Tax Code, Chapter 151 or Chapter 183.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 4, 2008.

TRD-200802874
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: June 24, 2008
Proposal publication date: January 4, 2008
For further information, please call: (512) 475-0387

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Employees Retirement System of Texas

Title 34, Part 4

The Employees Retirement System of Texas (ERS) files this Notice of Intent to Review 34 Texas Administrative Code (TAC), Chapter 79, Social Security, pursuant to Texas Government Code §2001.039. As required by this statute, the review will assess whether the reasons for initially adopting 34 TAC Chapter 79 continue to exist and whether any amendments should be made to the chapter as a result of this review. The public comment period will last 30 days beginning with the publication of this Notice of Intent to Review.

Comments or questions regarding this rule review may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas, 78711-3207, or emailed to paula.jones@ers.state.tx.us.

TRD-200802985
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Filed: June 9, 2008

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Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy files this notice of intent to review Chapter 291 (§§291.71 - 291.76), concerning Institutional Pharmacy (Class C), pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

Comments regarding whether the reason for adopting the chapter continues to exist may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., July 21, 2008.

TRD-200802975
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: June 9, 2008

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The Texas State Board of Pharmacy files this notice of intent to review Chapter 303 (§§303.1 - 303.3), concerning Destruction of Dangerous Drugs and Controlled Substances, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

Comments regarding whether the reason for adopting the chapter continues to exist may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., July 21, 2008.

TRD-200802974
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: June 9, 2008

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Adopted Rule Reviews

Texas Department of Agriculture

Title 4, Part 1

The Texas Department of Agriculture (the department) adopts the review of Title 4, Texas Administrative Code, Part 1, Chapter 1, concerning General Procedures, Subchapter A, concerning General Rules of Practice; Subchapter B, concerning Collection of Debts; Subchapter C, concerning Minority Purchasing; Subchapter D, concerning Miscellaneous Provisions; Subchapter E, concerning Advisory Committees; Subchapter G, concerning Interagency Agreements; Subchapter H, concerning Requests for Public Information; Subchapter J, concerning Agricultural Lien Disputes; Subchapter K, concerning Employee Training Rules; Subchapter L, concerning Urban Schools Grants Program; Subchapter M, concerning Surplus Agricultural Products Grant Program; Subchapter N, concerning Food and Fibers Research Grant Program; and Subchapter O, concerning Home-Delivered Meal Grant Program, pursuant to the Texas Government Code, §2001.039, and readopts all sections in Chapter 1, Subchapters A - E and G, H, and J - O, with amendments proposed to Chapter 1 in the department's notice of intent to review. The notice of intent to review was published in the April 25, 2008, issue of the *Texas Register* (33 TexReg 3449).

Section 2001.039 requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist. As part of the review process, the department proposed amendments to Chapter 1, Subchapter A, §1.24 and §1.30; Subchapter B, §1.53; Subchapter C, §1.71 and §§1.73 - 1.78; Subchapter H, §1.400, §1.402 and §1.404; Subchapter K, §1.700; Subchapter N, §1.923; new Subchapter K, §1.701, and the repeal of Subchapter D, §1.85; Subchapter E, §1.205; Subchapter G, §1.300; Subchapter H, §1.401 and §1.403; and Subchapter K, §1.701. The proposed amend-

ments and repeals were also published in the April 25, 2008, issue of the *Texas Register* (33 TexReg 3363).

The assessment of Title 4, Part 1, Chapter 1, Subchapters A - O, by the department at this time indicates that, with the addition of the adopted amendments to Subchapters A, B, C, H, K, and N, and proposed repeals in Subchapters D, E, G and H, the reason for readopting without changes all sections in these subchapters continues to exist.

TRD-200802993
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: June 9, 2008

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Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 100, Charters, Subchapter AA, Commissioner's Rules Concerning Open-Enrollment Charter Schools, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 100, Subchapter AA, in the April 11, 2008, issue of the *Texas Register* (33 TexReg 2983).

The TEA finds that the reasons for adopting 19 TAC Chapter 100, Subchapter AA, continue to exist and readopts the rules. The TEA plans to propose changes as a result of the review to update statutory references.

The TEA received no comments related to the rule review of 19 TAC Chapter 100, Subchapter AA.

This concludes the review of 19 TAC Chapter 100.

TRD-200802919
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: June 6, 2008

♦ ♦ ♦

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 129, Student Attendance, Subchapter AA, Commissioner's Rules, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 129, Subchapter AA, in the April 11, 2008, issue of the *Texas Register* (33 TexReg 2984).

The TEA finds that the reasons for adopting 19 TAC Chapter 129, Subchapter AA, continue to exist and readopts the rules. The TEA plans to propose rule changes as a result of the review to reflect updates to the optional method of calculating average daily attendance in districts with significant migrant populations; update a statutory reference for student attendance accounting standards; and amend the application process and remove outdated information regarding the optional flexible school day program.

The TEA received no comments related to the rule review of 19 TAC Chapter 129, Subchapter AA.

This concludes the review of 19 TAC Chapter 129.

TRD-200802920
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: June 6, 2008

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Texas Workforce Investment Council

Title 40, Part 22

The Texas Workforce Investment Council (Council) adopts the review to Title 40, Texas Administrative Code (TAC), Part 22, Chapter 901, Designation and Redesignation of Local Workforce Development Areas, in accordance with Texas Government Code, §2001.039.

The notice of intention to review 40 TAC §901.1 and §901.2 was published in the March 28, 2008 issue of the *Texas Register* (33 TexReg 2703). The public comment period closed on April 28, 2008. Following is a summary of the one public comment regarding the rule review to 40 TAC Chapter 901, Designation and Redesignation of Local Workforce Development Areas.

Comment. One commenter inquired about what options that the Council might consider if it determined that the rules are no longer needed. The commenter expressed concern that absent a state process for how local workforce areas are redesignated, such requests could be submitted by numerous entities.

Agency response. The Council concurred with the commenter that the current rules are important because they provide a clear and accessible process whereby requests are considered by the Council in accordance with the requirements of state and federal law.

The Council determined that the original reason for adopting these rules continues to exist. No changes are being proposed to the rules (40 TAC §901.1 and §901.2) as a result of this review.

This rule review is adopted under the authority of Texas Government Code, §2308.101(3) which requires the Council to recommend to the Governor the designation and redesignation of local workforce development areas and §2308.103(a)(1) which authorizes the Council to adopt rules.

This concludes the review of 40 TAC Chapter 901. No other code, statute, or article is affected by this rule review.

TRD-200803017
Cheryl Fuller
Director
Texas Workforce Investment Council
Filed: June 10, 2008

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 16 TAC §8.207(g)

GRADE	DEFINITION	ACTION CRITERIA	EXAMPLES
1	A leak that represents an existing or probable hazard to persons or property, and requires immediate repair.	Requires immediate repair. Requires prompt action to eliminate the hazardous conditions. The prompt action in some instances may require one or more of the following: ▪ Implementation an emergency plan (§192.615). ▪ Evacuating premises. ▪ Blocking off an area. ▪ Rerouting traffic. ▪ Eliminating sources of ignition. ▪ Venting the area by removing manhole covers, barholing, installing vent holes, or other means. ▪ Stopping the flow of gas by closing valves or other means. ▪ Notifying emergency responders.	▪ Any leak which, in the judgment of operating personnel at the scene, is regarded as an immediate hazard. ▪ Escaping gas that has ignited. ▪ Any indication of gas, which has migrated into or under a building, or into a tunnel. ▪ Any reading at the outside wall of a building, or where gas would likely migrate to an outside wall of a building. ▪ Any reading of 80% LEL, or greater, in a confined space. ▪ Any reading of 80% LEL, or greater in small substructures (other than gas associated substructures) from which gas would likely migrate to the outside wall of a building. ▪ Any leak that can be seen, heard, or felt, and which is in a location that may endanger the general public or property.
2	A leak that is recognized as being non-hazardous at the time of detection, but requires scheduled repair based on probable future hazard	Leaks shall be repaired or cleared within six months from the date the leak was reported. In determining the repair priority, criteria such as the following should be considered: ▪ Amount and migration of gas. ▪ Proximity of gas to buildings and subsurface structures. ▪ Extent of pavement. ▪ Soil type, and soil conditions (such as frost cap, moisture and natural venting). Grade 2 leaks should be reevaluated at least once every 30 days until cleared. Grade 2 leaks vary greatly in degree of potential hazard. Some Grade 2 leaks, when evaluated by the above criteria, may require a scheduled repair within the next five working days. Others will require repair within 30 days. During the working day on which the leak is discovered, these situations should be brought to the attention of the individual responsible for scheduling leak repair. On the other hand, many Grade 2 leaks, because of their location and magnitude, can be scheduled for repair on a normal	Leaks Requiring Action Ahead of Ground Freezing or Other Adverse Changes in Venting Conditions. Any leak which, under frozen or other adverse soil conditions, would likely migrate to the outside wall of a building. Leaks Requiring Action Within Six Months ▪ Any reading of 40% LEL, or greater, under a sidewalk in a wall-to-wall paved area that does not qualify as a Grade 1 leak. ▪ Any reading of 100% LEL, or greater, under a street in a wall-to-wall paved area that has significant gas migration and does not qualify as a Grade 1 Leak. ▪ Any reading less than 80% LEL in small substructures (other than gas associated substructures) from which gas would likely migrate creating a probable future hazard. ▪ Any reading between 20% LEL and 80% LEL in a confined space. ▪ Any reading on a pipeline operating at 30 percent SMYS, or greater, in a class 3 or 4 location, which does not qualify as a Grade 1 leak. ▪ Any reading of 80% LEL, or greater, in gas associated substructures. ▪ Any leak which, in the judgment of operating personnel at the scene, is of sufficient magnitude to justify scheduled

GRADE	DEFINITION	ACTION CRITERIA	EXAMPLES
		routine basis with periodic reinspection as necessary.	repair.
3	A leak that is non-hazardous at the time of detection and can be reasonably expected to remain non-hazardous.	These leaks should be reevaluated during the next scheduled survey, or within 15 months of date reported, whichever occurs first, until the leak is cleared, re-graded, or repaired within 36 months.	Leaks Requiring Reevaluation at Periodic Intervals ▪ Any reading of less than 80% LEL in small gas associated substructures ▪ Any reading under a street in areas without wall-to-wall paving where it is unlikely the gas could migrate to the outside wall of a building. ▪ Any reading of less than 20% LEL in a confined space.

Figure: 31 TAC §13.17(a)

NEW OIL AND GAS PIPELINE EASEMENT RATES -- BASE YEAR 2008
10-YEAR TERM

Size	GLO Proposed Rates All rates based on price per rod				
	Region 1	Region 2	Region 3	Damages	Non-State O&G
Up to 13"	$ 14	$ 25	$ 20	$ 18	$ 126
13" & Greater	$ 36	$ 59	$ 48	$ 24	$ 126
TERM	10 YEARS				

NOTES TO PSF RATES:

1) Minimum amount for a pipeline contract is $670.
2) New fees are $350 per event of application, renewal, assignment, or amendment.
3) Rates for PSF acquired properties and properties within a municipality or its extraterritorial jurisdiction are negotiated, based on the appraised value of the property.
4) Perpetual easements are charged at three times the 10-year term rate.
5) Damages are charged per rod, and are applied to new easements only – not for renewals.
6) Damages for acquired properties and critical habitat may be negotiated as a single rate per rod (not added to the base damages rate) and are applied only to new easements – not for renewals.
7) Base rates are adjusted yearly according to the actual change in the CPI-U.

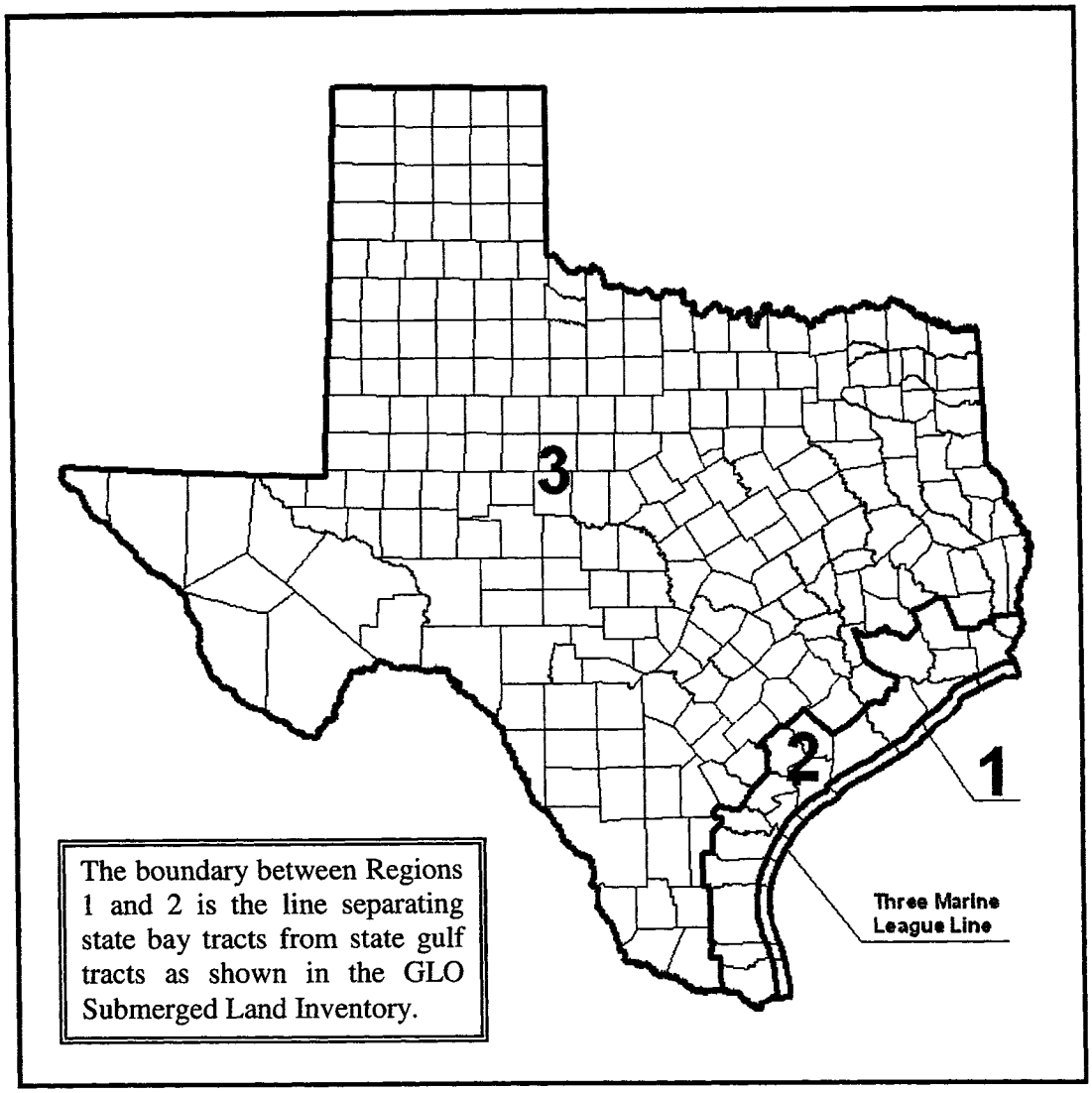
NEW OIL AND GAS PIPELINE EASEMENT RATES -- BASE YEAR 2008
20-YEAR TERM

Size	GLO Proposed Rates All rates based on price per rod				
	Region 1	Region 2	Region 3	Damages	Non-State O&G
Up to 13"	$ 19	$ 34	$ 27	$ 18	$ 172
13" & Greater	$ 50	$ 80	$ 65	$ 24	$ 172
TERM	20 YEARS				

NOTES TO PSF RATES:

1) Minimum amount for a pipeline contract is $1340.
2) New fees are $350 per event of application, renewal, assignment, or amendment.
3) Rates for PSF acquired properties and properties within a municipality or its extraterritorial jurisdiction are negotiated, based on the appraised value of the property.
4) Perpetual easements are charged at two times the 20-year term rate.
5) Damages are charged per rod, and are applied to new easements only – not for renewals.
6) Damages for acquired properties and critical habitat may be negotiated as a single rate per rod (not added to the base damages rate) and are applied only to new easements – not for renewals.
7) Base rates are adjusted yearly according to the actual change in the CPI-U.

PIPELINE EASEMENTS REGIONS MAP



IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Notice of Settlement

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code. Before the State may settle a judicial enforcement action under the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Texas Water Code.

Case Title and Court: *State of Texas and the Texas Commission on Environmental Quality v. Walter F. Duvall, individually, and d/b/a Nolanville Plaza Water Utility*, Cause No. GV-300289, in the 98th Judicial District Court, Travis County, Texas.

Nature of Defendant's Operations: Defendant owned and operated drinking water distribution and sewage collection facilities for the use of the residents of Plaza Mobile Home Park located in Bell County, Texas. The TCEQ investigated the facilities and found some violations, chief among them being that Defendant failed to pay a water supply bill causing the supply of drinking water to be suspended. Defendant also did not possess a Certificate of Convenience and Necessity. It was this situation which prompted the TCEQ to appoint a temporary manager. The State then brought this enforcement action seeking civil penalties and a receiver to rehabilitate the facilities. The receiver has since sold the facilities to a third party and has been discharged from duty by the Court.

Proposed Agreed Judgment: The Agreed Final Judgment orders Defendant to pay civil penalties and attorney's fees to the State. Defendant has agreed to pay Plaintiff $7,500.00, in civil penalties and an additional $5,000.00 in attorney's fees.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Anthony W. Benedict, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For further information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1841.

TRD-200803025
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: June 11, 2008

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Notice of Settlement of a Texas Clean Air Act Enforcement Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Clean Air Act. Before the State may settle a judicial enforcement action, pursuant to the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

Case Title and Court: Settlement Agreement in Harris County, Texas and the Texas Commission on Environmental Quality v. Jade Animal Farm, et al.; Cause No. 2006-74061, 61st Judicial District, Harris County, Texas.

Background: This suit alleges violations of the Texas Clean Air Act resulting from the operation of an animal feeding operation and slaughterhouse in Harris County, Texas. The Defendant is Jade Animal Farm, L.L.C. d/b/a Old Richmond Farm, and Duyen Nguyen, Dung Vu and Huyen Nguyen. The suit seeks injunctive relief, civil penalties, attorney's fees and court costs. The Clean Air Act violations are for air nuisance.

Nature of Settlement: The settlement awards $6,219.00 in civil penalties and $1,062.00 in attorney's fees to the State and $6,219.00 in civil penalties and $2,500.00 in attorney's fees to Harris County. The Final Judgment orders the Defendants to comply with the Texas Clean Air Act and rules related to the proper operation of animal feeding operations. It also prohibits the Defendants from operating a slaughterhouse in the State of Texas.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgments, and written comments on the proposed settlement should be directed to Vanessa Puig-Williams, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0052. Written comments must be received within 30 days of publication of this notice to be considered.

For further information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1841.

TRD-200803018
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: June 11, 2008

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Austin-San Antonio Intermunicipal Commuter Rail District

Notice of Request for Proposals

The Austin-San Antonio Intermunicipal Commuter Rail District (Rail District) seeks proposals from professional firms to provide the Rail District with **branding services** to establish the Rail District's identity and communicate its purpose and function.

The Request for Proposals (RFP) is available on the Rail District website: **www.asarail.org**. Responses to the RFP must be received by the Rail District no later than 3:00 p.m. on July 23, 2008 to be considered.

TRD-200803027
Ross E. Milloy
Interim Executive Director
Austin-San Antonio Intermunicipal Commuter Rail District
Filed: June 11, 2008

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of May 30, 2008, through June 5, 2008. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on June 11, 2008. The public comment period for this project will close at 5:00 p.m. on July 11, 2008.

FEDERAL AGENCY ACTIONS:

Applicant: Davis Petroleum Corporation; Location: The project is located approximately 4.8 miles east of Seabrook in State Tract (ST) 218 of Galveston Bay, Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Bacliff, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 311,395; Northing: 3,274,477.8. Project Description: The applicant proposes to drill ST 218, Well #1, install well and production platforms and lay flowlines. The applicant requests authorization to lay and maintain one of the following up to 6-inch diameter pipelines: Pipeline "A" - from said well approximately 2,529 feet southwest to an existing Davis Petroleum 8-inch pipeline. Pipeline "B" - from said well approximately 5,760 feet southeast to an existing Davis Petroleum well in ST 252. Pipeline "C" - from said well approximately 11,232 feet to an existing Davis Petroleum platform in ST 251. Only one of the pipelines would be installed. The following sediment displacement would occur during the proposed pipeline construction: (1) Line "A" approximately 1,500 cubic yards; (2) Line "B" approximately 3,400 cubic yards; or (3) Line "C" approximately 6,650 cubic yards. Approximately 1,267 cubic yards of gravel or crushed concrete may be placed for pad construction under the drilling rig. This activity would include installation of typical marine barge and keyway, shell and/or gravel pad, production structure with attendant facilities, and flowlines. CCC Project No.: 08-0154-F1. Type of Application: U.S.A.C.E. permit application #SWG-2008-00353 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Bay Bridge Texas, LLC; Location: The project is located on a 36-acre site between Ostos Road and the southern bank of the Brownsville Ship Channel (BSC) between Station 68+000 and 70+000 on the east side of Brownsville, Cameron County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: Palmito Hill, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 665500; Northing: 2873000. Project Description: The applicant proposes to construct a ship breaking facility that will include a parallel mooring berth, dismantling slip, bulkheads, material handling pads, buildings, road, limited utilities, and a rail extension. The berth would be 1,500 feet long, approximately 275 feet wide, and cover 9.5 acres parallel to the BSC. Depth would be -34 feet MHT. The slip would be at a right angle to the BSC, 550 feet long, 120 feet wide, and cover 1.5 acres. Water depth would be -34 feet deep. Approximately 730,000 cubic yards of material would be mechanically excavated to create the berth and the slip. Approximately 100,000 cubic yards of material would be placed in the yard for leveling the site and the remainder would be placed in Dredged Material Placement Area No. 7. Out of the 11.5 acres for the berth and slip, approximately 2.24 acres of adjacent wetlands and sand flats would be excavated during the project. Proposed mitigation for excavation impacts would be a 6.7-acre wetland enhancement project. A grid system of six 25-foot-wide by 4-foot-deep channels would be constructed on an 8-acre site along a channel that runs from the BSC to Bahia Grande. Three channels would connect to the primary channel, and three internal cross channels would be aligned with prevailing summer winds. The site is located approximately 3.5 miles east of the proposed project. A portion of excavated material would be used to construct a 3-foot-high perimeter levee, and the remainder would be placed near the center of four cells to create uplands. Natural colonization by seagrasses and wetland vegetation is expected to occur. CCC Project No.: 08-0155-F1. Type of Application: U.S.A.C.E. permit application #SWG-2008-00220 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Suemar Exploration and Production, LLC; Location: The project is located in the Elias Stone Survey, A-188, and approximately 19.7 miles southwesterly from Winnie, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: High Island, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 363121; Northing: 3268899. Project Description: The applicant proposes to impact 4.24 acres of herbaceous wetlands during the construction of a drill site and access road and temporarily impact 3.64 acres of herbaceous wetlands during the installation of a pipeline. The applicant is proposing to conduct drilling and production activities to develop oil and gas reserves underlying private property in Galveston County. This area is identified as the Skull and Crossbones Prospect. The applicant proposes to construct a boarded drill site, boarded access road, and approximately 17,990 feet of 10-inch pipeline. This pipeline would connect the proposed drill site on the coast with the proposed Central Gas Sales Facility to the north, which is associated with the Lafitte's Gold Prospect (Application Number SWG-2008-00266). To compensate for impacts resulting from the proposed drill site and access road, the applicant would establish a conservation easement on Edwin Arnaud Inc. Rose City Marsh at a ratio of 3:1. The applicant has stated that permanent impacts cannot be calculated at this time because success of the well is unknown; however, permanent impacts would not exceed the proposed impacts (4.24 acres). In the event of an unsuccessful well, boards would be removed, pre-project contours established and the area would be left to naturally revegetate. CCC Project No.: 08-0156-F1. Type of Application: U.S.A.C.E. permit application #SWG-2008-00089 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad

Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy the consistency certifications for inspection, may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200803016
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: June 10, 2008

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Comptroller of Public Accounts

Local Sales Tax Rate Changes Effective July 1, 2008

An additional 1/2 percent city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** will be **abolished** effective July 1, 2008 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Goliad (Goliad Co)	2088014	.015000	.082500

A 1/2 percent special purpose district sales and use tax will become effective July 1, 2008 in the special purpose district listed below.

SPD NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Goliad Municipal Development District	5088504	.005000	SEE NOTE 1

A 1 percent special purpose district sales and use tax will become effective July 1, 2008 in the special purpose districts listed below.

SPD NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Harris County Emergency Services District No. 2	5101678	.010000	SEE NOTE 2
Harris County Emergency Services District No. 60	5101687	.010000	SEE NOTE 3
Travis County Emergency Services District No. 5	5227597	.010000	SEE NOTE 4

NOTE 1: The Goliad Municipal Development District is located in the central portion of Goliad County. The district has the same boundaries as the city of Goliad and its extraterritorial jurisdiction. The Goliad Municipal Development District is located entirely within ZIP Code 77963. Contact the district representative at (361) 645-3454 for additional boundary information.

NOTE 2: The Harris County Emergency Services District No. 2, which provides emergency medical and ambulance services, is located in the eastern portion of Harris County. The district does not include any area within the city of Houston or the Houston MTA. The district overlaps and contains most of the same territory as the Harris County Emergency Services District No. 60. The unincorporated area of Harris County in ZIP Codes 77044 and 77049 is partially located in the Harris County Emergency Services District No. 2. Contact the district representative at (713) 652-6500 for additional boundary information.

NOTE 3: The Harris County Emergency Services District No. 60, which provides fire and rescue services, is located in the eastern portion of Harris County. The district does not include any area within the city of Houston or the Houston MTA. The district overlaps and contains most of the same territory as the Harris County Emergency Services District No. 2. The unincorporated area of Harris County in ZIP Codes 77044 and 77049 is partially located in the Harris County Emergency Services District No. 60. Contact the district representative at (713) 652-6500 for additional boundary information.

NOTE 4: The Travis County Emergency Services District No. 5 is located in the southern portion of Travis County. The city of San Leanna, which does not impose a city sales and use tax and is within the Austin MTA, is located entirely within the district. The unincorporated area of Travis County in ZIP Codes 78652, 78739, and 78749 is partially located within the Travis County Emergency Services District No. 5. Contact the district representative at (512) 247-8352 for additional boundary information.

TRD-200802903
Martin Cherry
General Counsel
Comptroller of Public Accounts
Filed: June 6, 2008

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 06/16/08 - 06/22/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 06/16/08 - 06/22/08 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200803005
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: June 9, 2008

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Texas Education Agency

Request for Applications Concerning Early College High School Small and Rural District Planning Grant

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-08-122 from Texas independent school districts (ISDs) partnered with public institutions of higher education (IHEs) for the Early College High School (ECHS) Small and Rural District Planning Grant. Two eligibility options are available. Under option one, a single ISD with enrollment of at least 1,000 but no more than 4,000 students may partner with a public IHE, with either partner eligible to serve as the fiscal agent. Under option two, up to five ISDs with individual enrollments of up to 4,000 students may form a shared services arrangement (SSA) in partnership with an IHE. The fiscal agent of the SSA may be either the public IHE or one of the ISDs, provided that the ISD chosen to serve as fiscal agent has an enrollment of at least 1,000 students. (ISDs with enrollments of less than 1,000 students may not apply on their own. They may belong to an SSA but may not serve as fiscal agent.) Open-enrollment charter schools located within the boundaries of one or more eligible ISDs are also eligible to apply under the same conditions that apply to ISDs (i.e., either in partnership with a public IHE or as part of an SSA with other eligible ISDs/open-enrollment charter schools). Eligible applicants will participate in a planning process that will include investigating and becoming knowledgeable about the ECHS model.

Description. The primary goals of the ECHS Small and Rural District Planning Grant are to enable small and rural districts to research the ECHS model in order to develop viable plans to implement an ECHS that maintains the core principles of ECHS while addressing the specific needs of small and rural districts; to identify challenges and develop solutions and models for small and rural districts interested in implementing either the ECHS model or its best practices; and to increase the college readiness and success of students as demonstrated through participation in dual credit and advanced placement courses, and ultimately through application, matriculation, and persistence in college. Under the guidance and support of TEA staff or a technical assistance provider, a Texas ISD or open-enrollment charter school will collaborate with its IHE partner to develop and refine a comprehensive plan for opening an ECHS.

Dates of Project. The ECHS Small and Rural District Planning Grant will be implemented during the 2008-2009 school year. Applicants should plan for a starting date of no earlier than December 1, 2008, and an ending date of no later than May 1, 2009.

Project Amount. Funding will be provided for approximately 4-6 projects. Each project will receive a maximum of $80,000 for the 2008-2009 school year. Project funding in subsequent periods will be based on satisfactory progress of the first-year objectives and activities, on general budget approval by the commissioner of education, and on appropriations by the state legislature.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. Due to the high cost of printing and mailing RFAs, they will no longer be available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Tuesday, August 19, 2008, to be eligible to be considered for funding.

TRD-200803021
Cristina De La Fuente-Valadez
Director, Policy Coordination Division
Texas Education Agency
Filed: June 11, 2008

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **July 21, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on July 21, 2008**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: 15010, INC dba On The Move 5; DOCKET NUMBER: 2008-0366-MLM-E; IDENTIFIER: RN102130614; LOCATION: Pflugerville, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 Texas Administrative Code (TAC) §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow-through for the month plus 130 gallons; 30 TAC §334.8(c)(4)(A)(vii) and (c)(5)(B)(ii), by failing to timely renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; and 30 TAC §213.5(d)(1), by failing to provide a functioning continuous monitoring leak detection system that is capable of immediately alerting of possible leakages; PENALTY: $6,500; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 2800 South Interstate Highway 35, Suite 100, Austin, Texas (512) 339-2929.

(2) COMPANY: Bruni Rural Water Supply Corporation; DOCKET NUMBER: 2008-0595-MWD-E; IDENTIFIER: RN101524288; LOCATION: Bruni, Webb County; TYPE OF FACILITY: domestic wastewater treatment facility; RULE VIOLATED: 30 TAC §305.125(17) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013924001, Sludge Provisions, by failing to timely submit the annual sludge reports; PENALTY: $210; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(3) COMPANY: Buchanan Lake Village, Inc.; DOCKET NUMBER: 2008-0285-PWS-E; IDENTIFIER: RN101224988; LOCATION: Llano County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(C)(iii) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to provide two or more service pumps having a total capacity of 2.0 gallons per minute per connection; and 30 TAC §290.45(b)(1)(C)(iv) and THSC, §341.0315(c), by failing to provide pressure tank capacity of 20 gallons per connection; PENALTY: $630; ENFORCEMENT COORDINATOR: Christopher Keffer, (512) 239-5610; REGIONAL OFFICE: 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(4) COMPANY: Eastern Cass Water Supply Corporation; DOCKET NUMBER: 2008-0619-PWS-E; IDENTIFIER: RN101256444; LOCATION: Cass County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter (mg/L) for total trihalomethanes, based on a running annual average; PENALTY: $347; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(5) COMPANY: EBAA Iron, Inc.; DOCKET NUMBER: 2008-0161-AIR-E; IDENTIFIER: RN100217306; LOCATION: Eastland, Eastland County; TYPE OF FACILITY: ductile iron foundry; RULE VIOLATED: 30 TAC §122.146(1) and THSC, §382.085(b), by failing to submit an annual compliance certification; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Sidney Wheeler, (512) 239-4969; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(6) COMPANY: Fort Bend County Municipal Utility District No. 130; DOCKET NUMBER: 2008-0411-MWD-E; IDENTIFIER: RN102342391; LOCATION: Fort Bend County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: the Code, §26.121(a), 30 TAC §305.125(1), and TPDES Permit Number WQ0014011001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, by failing to comply with permit effluent limits for dissolved oxygen, total suspended solids (TSS), and total ammonia nitrogen; PENALTY: $4,170; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3048; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: Kenneth Haddad and Maynard Haddad dba H & H Car Wash; DOCKET NUMBER: 2008-0382-PST-E; IDENTIFIER: RN100961473; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: car wash with three USTs; RULE VIOLATED: 30 TAC §334.45(c)(3)(A), by failing to install an emergency shutoff valve on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube for each regulated UST according to the UST registration and self-certification form; 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the agency for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition; 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for the inspection upon request by agency personnel; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure

that all USTs are monitored in a manner which will detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once each month sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow-through for the month plus 130 gallons; PENALTY: $6,500; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas (915) 834-4949.

(8) COMPANY: Owens Corning Composite Materials, LLC; DOCKET NUMBER: 2008-0547-AIR-E; IDENTIFIER: RN100222140; LOCATION: Amarillo, Randall County; TYPE OF FACILITY: fiberglass manufacturing plant; RULE VIOLATED: 30 TAC §101.20(3) and §116.115(c), THSC, §382.085(b), New Source Review (NSR) Permit Number 5042/PSD-TX-844M1, Special Condition (SC) Number 1, by failing to comply with permitted emissions limits for particulate matter (PM), nitrogen oxides (NO_x), and carbon monoxide; 30 TAC §101.20(3) and §116.115(c), THSC, §382.085(b), and NSR Permit Number 5042/PSD-TX-844M1, SC Number 6F, by failing to comply with permitted emission limits of 1.0 pounds (lbs) PM/ton of glass produced and 1.4 lbs NO_x/ton of glass produced; and 30 TAC §101.20(3) and §116.115(c), THSC, §382.085(b), and NSR Permit Number 5042/PSD-TX-844M1, SC Number 15C, by failing to provide a schedule for submittal of the copies of a final sampling report within 30 days after sampling is completed; PENALTY: $14,900; ENFORCEMENT COORDINATOR: Bryan Elliott, (512) 239-6162; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: Quala Systems, Inc.; DOCKET NUMBER: 2008-0319-AIR-E; IDENTIFIER: RN102169950; LOCATION: Clute, Brazoria County; TYPE OF FACILITY: semi-truck tank cleaning; RULE VIOLATED: 30 TAC §116.115(c), NSR Permit Number 48930, SC 15, and THSC, §382.085(b), by failing to comply with the flare pilot flame monitoring requirements; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 422-8931; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1425, (713) 767-3500.

(10) COMPANY: Ray French Land Company, Ltd.; DOCKET NUMBER: 2008-0487-WQ-E; IDENTIFIER: RN105119721; LOCATION: Parker County; TYPE OF FACILITY: residential construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to develop and implement a storm water pollution prevention plan and obtain authorization to discharge storm water associated with construction activities; PENALTY: $1,900; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5890; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2008-0560-AIR-E; IDENTIFIER: RN100219526; LOCATION: Houston, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 46307, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; Supplemental Environmental Project (SEP) offset amount of $4,000 applied to Harris County Public Health and Environmental Services-Pollution Control Division's Fourier Transform Infra Red (FTIR) Project; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3629; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1425, (713) 767-3500.

(12) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2008-0624-AIR-E; IDENTIFIER: RN100219526; LOCATION: Houston, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: Air Permit Number 46307, SC Number 1, 30 TAC §116.115(c), and THSC, §382.085(b), by failing to prevent unauthorized emissions of volatile organic compounds; and 30 TAC §101.20(a)(1)(B) and THSC, §382.085(b), by failing to submit an initial notification within 24 hours after the discovery of the emissions event; PENALTY: $10,361; SEP offset amount of $4,144 applied to Harris County Public Health and Environmental Services-Pollution Control Division's Fourier Transform Infra Red (FTIR) Project; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 422-8931; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1425, (713) 767-3500.

(13) COMPANY: Texas Tech University; DOCKET NUMBER: 2008-0206-PWS-E; IDENTIFIER: RN101247336; LOCATION: Lubbock County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(f)(3), by failing to properly develop and maintain monthly operating reports of the public water system; 30 TAC §290.110(b)(4) and §290.46(d)(2)(A) and THSC, §341.0315(c), by failing to operate the disinfectant equipment to maintain the residual disinfectant concentration in the water at least 0.2 mg/L free chlorine throughout the distribution system at all times; and 30 TAC §290.51(a)(3), by failing to pay all annual and late Public Health Service fees; PENALTY: $556; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 403-4077; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(14) COMPANY: City of Weatherford; DOCKET NUMBER: 2008-0490-AIR-E; IDENTIFIER: RN105426910; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: site for fire department training; RULE VIOLATED: 30 TAC §111.201 and THSC, §382.085(b), by failing to prevent unauthorized outdoor burning; PENALTY: $1,000; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 79414-3421, (817) 588-5800.

(15) COMPANY: R. J. Whitfield; DOCKET NUMBER: 2008-0494-MSW-E; IDENTIFIER: RN105211775; LOCATION: Rosebud, Falls County; TYPE OF FACILITY: unauthorized disposal and tire storage site; RULE VIOLATED: 30 TAC §330.15(c), by failing to dispose of municipal solid waste at an authorized facility; and 30 TAC §328.60(a), by failing to obtain a scrap tire storage registration for storing more than 500 scrap or used tires on the ground; PENALTY: $3,775; ENFORCEMENT COORDINATOR: Cynthia McKaughan, (512) 239-0735; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-200803015
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: June 10, 2008

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 101 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony regarding proposed revisions to 30 TAC Chapter 101, General Air Quality Rules; Subchapter H, Emissions Banking and Trading; Division 7, Clean Air Interstate Rule; §§101.502, 101.504, 101.506 and 101.508 and to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, of the United

States Environmental Protection Agency concerning state implementation plans.

The proposed rulemaking and SIP revision would implement revisions to the Texas Health and Safety Code, §382.0173 as required by Senate Bill (SB) 1672, 80th Legislature, 2007, which revises the methodology for allocation of Clean Air Interstate Rule (CAIR) nitrogen oxides allowances. The proposed revisions also incorporate federal changes to CAIR and make non-substantive administrative changes.

Public hearings for the proposed rulemaking and SIP revision have been scheduled in Fort Worth on July 15, 2008, at 2:00 p.m. at the Texas Commission on Environmental Quality Regional Office, located at 2309 Gravel Drive; in Austin on July 16, 2008, at 2:00 p.m. in Building C, Room 131E at the Texas Commission on Environmental Quality complex, located at 12100 Park 35 Circle; and in Houston on July 17, 2008 at 2:00 p.m. in Conference Room B at Houston-Galveston Area Council, located at 3555 Timmons Lane, Number 120. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during each hearing; however, commission staff members will be available to discuss the proposal 30 minutes before each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Joyce Spencer, Air Quality Division at (512) 239-5017. Requests should be made as far in advance as possible.

Comments may be submitted to Kristin Smith, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference the rule or SIP project numbers that they pertain to: Rule Project Number 2007-053-101-EN for proposed rule changes, and SIP Project Number 2007-051-SIP-NR for proposed SIP changes. Comments must be received by July 18, 2008. Copies of the proposed rules can be obtained from the commission's web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. Copies of the proposed SIP revision and all appendices can be obtained from the commission's web site at *http://www.tceq.state.tx.us/implementation/air/sip/sipplans.html*. For further information regarding the proposed rules, please contact Brandon Greulich, Air Quality Planning Section, (512) 239-4904; and regarding the proposed SIP revision, please contact Kim Herndon, Air Quality Planning Section, at (512) 239-1421.

TRD-200802910
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 6, 2008

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 321

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning proposed revisions to 30 TAC Chapter 321, Control of Certain Activities by Rule, under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would provide a streamlined process to authorize the construction and operation of reclaimed water production facilities at a location other than a permitted wastewater treatment facility.

The commission will hold a public hearing on this proposal in Austin on July 15, 2008 at 10:00 a.m. in Room 201S, Building E, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

Written comments may be submitted to Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-002-321-PR. The comment period closes July 21, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Mary Ann Dimakos Airey, P.E., Wastewater Permitting Section at (512) 239-4521.

TRD-200802908
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 6, 2008

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 330

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding the proposed amendment to 30 TAC Chapter 330, Municipal Solid Waste.

The proposed rulemaking would allow wastes generated from activities regulated by the Railroad Commission of Texas or other contaminated soils having concentrations greater than 1,500 milligrams per kilogram total petroleum hydrocarbons to be used as an alternative daily cover in a municipal solid waste landfill if contaminant concentrations are below protective concentration levels; and allow wastes approved as an alternative daily cover to exceed waste constituent limitations on wastes authorized for disposal at a municipal solid waste landfill if permit applicants demonstrate that the wastes will be used in a protective manner.

A public hearing on this proposal will be held in Austin on July 15, 2008 at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Michael Parrish,

Office of Legal Services, at (512) 239-2548. Requests should be made as far in advance as possible.

Comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments.* File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2008-013-330-PR. The comment period closes July 21, 2008. To view rules, please visit *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information or questions concerning this proposal, please contact Wayne Harry, Municipal Solid Waste Permits Section, at (512) 239-6619.

TRD-200802913
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 6, 2008

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Notice of Water Quality Applications

The following notices were issued during the period of May 28, 2008 through June 5, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

ANA ARAUJO JOHNSON has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0011821001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located approximately 1,000 feet southeast of the intersection of Aldine Westfield Road and Aldine Mail Road, between Aldine Road and Isom Street in Harris County, Texas.

CHATEAU WOODS MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0013700001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located 600 feet north of the intersection of Longleaf Drive and Beech Street in the Chateau Woods Subdivision in Montgomery County, Texas.

CHEVRON PHILLIPS CHEMICAL COMPANY LP which operates a dock and terminal facility for aromatic hydrocarbons, has applied for a renewal of TPDES Permit No. WQ0004327000, which authorizes the discharge of storm water and hydrostatic test water on an intermittent and variable basis. The facility is located on Coke Dock Road in Port Arthur, Texas; 3/4 mile Southwest of the intersection of State Highway 82 and West 7th Street, Jefferson County, Texas.

CHRISTIAN TABERNACLE OF HOUSTON INC has applied for a renewal of TPDES Permit No. WQ0013581001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day. The facility is located approximately 1 mile northeast of the intersection of Farm-to-Market Road 526 and Wallisville Road in Harris County, Texas.

CITY OF HOUSTON has applied for a major amendment to TPDES Permit No. WQ0010495002 to authorize an increase in the two-hour peak flow of treated domestic wastewater from Outfall 001 from 55,417 gallons per minute (gpm) to 60,972 gpm and the two-hour peak flow of treated domestic wastewater from Outfall 002 from 87,208 gpm to 131,250 gpm. The Sims Bayou North Wastewater Treatment Facility is located at 9500 La Porte Road, adjacent to the confluence of Plum Creek with Sims Bayou, in the City of Houston, in Harris County, Texas. The Sims Bayou South Wastewater Treatment Facility is located adjacent to and east of the intersection of Central Street and Old Galveston Road, in the City of Houston, in Harris County, Texas. The Scott Street Wet Weather Facility is located on the northeast side of the Houston Belt and Terminal rail yard crossing, approximately 3,500 feet south of the intersection of Interstate Highway 45 and Calhoun Road, in the City of Houston, in Harris County, Texas.

DEER PARK ENERGY CENTER LIMITED PARTNERSHIP AND CALPINE OPERATING SERVICES COMPANY INC which operate the Deer Park Energy Center, a combined cycle power generation facility, have applied for a major amendment to TPDES Permit No. WQ0004344000 to authorize an increase in permitted daily average flow not to exceed 1,350,000 gallons per day to a daily average flow not to exceed 1,480,000 gallons per day via Outfall 001. The current permit authorizes the discharge of cooling tower blowdown and previously monitored effluent at a daily average flow not to exceed 1,350,000 gallons per day and daily maximum flow not to exceed via Outfall 001, low volume waste on a flow variable basis via Outfall 101; and metal cleaning waste on an intermittent and flow variable basis via Outfall 201. The facility is located on the north side of State Highway 225, 1,500 feet east of Shell Dock Road, Harris County, Texas.

MAVERICK COUNTY has applied for a major amendment to Permit No. WQ0013716001, to authorize an increase in the daily average flow from 10,000 gallons per day to 200,000 gallons per day. The proposed amendment also requests to convert TPDES Permit No. WQ0013716001 to Texas Land Application Permit via surface irrigation of 60 acres of non-public access land which will consist primarily of coastal bermuda grass. The current permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day. This permit will not authorize a discharge of pollutants into waters in the State. The Interim I phase facility is located approximately 4,300 feet southeast of the intersection of U.S. Highway 277 and State Highway 131 in Maverick County, Texas. The wastewater treatment facility and disposal site for the Interim II and Final Phases will be located approximately 4,300 feet southeast of the intersection of U.S. Highway 277 and State Highway 131 in Maverick County, Texas. The wastewater treatment facility and disposal site are located in the drainage basin of Rio Grande below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin.

NI AMERICA TEXAS DEVELOPMENT LLC has applied for a new permit, proposed TPDES Permit No. WQ0014879001 to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 400,000 gallons per day. The facility will be located approximately 1 mile northwest of the intersection of State Highway 6 and Farm-to-Market Road 2154 in Brazos County, Texas.

NRG TEXAS POWER LLC which operates the Greens Bayou Electric Generating Station, a steam electric generating facility, has applied for a renewal of TPDES Permit No. WQ0001031000, which authorizes the discharge of previously monitored effluents (PMEs) (metal cleaning wastes, cooling tower blowdown, low volume wastewater, sanitary wastewater, and storm water from internal Outfalls 101, 201, 301, and 401) and storm water runoff on a flow variable but continuous basis via Outfall 001; and low volume wastewater, process wastewater from Spill Prevention Control and Counter-measure (SPCC) sources and storm water from the Floor Drainage Treatment System and the SPCC Treatment System on an intermittent and flow variable basis via Outfall 002. The facility is located adjacent to and south of U.S. High-

way 90 and northeast of Greens Bayou, approximately one mile southwest of the intersection of U.S. Highway 90 and Farm-to-Market Road 526 in the City of Houston, Harris County, Texas.

SHELDON ROAD MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0010541002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 220,000 gallons per day. The facility is located approximately 0.8 miles northwest of the intersection of Business Highway 90 (Beaumont Highway) and Sheldon Road in Harris County, Texas.

THE CITY OF LAREDO has applied to the Texas Commission on Environmental Quality (TCEQ) for a minor amendment to TPDES Permit No. WQ0010681003 to add an Interim II phase with an annual average flow not to exceed 7,500,000 gallons per day (gpd). The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 6,000,000 gpd in the interim phase and at an annual average flow not to exceed 9,000,000 gpd in the final phase. The current permit also authorizes the permittee to land apply sludge on 65 acres of land adjacent to the wastewater treatment facilities. This application was submitted to the TCEQ on January 16, 2008. The facility is located approximately 3,500 feet west of U.S. Highway 83 and 3.2 miles south of the intersection of U.S. Highway 83 and State Highway 20 in Webb County, Texas.

WESTFIELD MOBILE HOME COMMUNITY LTD has applied for a renewal of TPDES Permit No. WQ0012555001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located at 520 Gulf Bank Road approximately 1,300 feet east of Airline Drive in Harris County, Texas.

WOOD OAKS HOLLOW LLC has applied for a new permit, proposed TPDES Permit No. WQ0014878001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility will be located approximately 1,000 feet south and 1,996 feet west of the intersection of County Highway 285 and County Highway 827 in Collin County, Texas.

ZACHRY CONSTRUCTION CORPORATION (San Antonio), which operates a facility for the maintenance and repair of construction equipment, has applied for a renewal of TPDES Permit No. WQ0004117000, which authorizes the discharge of storm water on an intermittend and variable basis. The facility is located at 527 Logwood Avenue at West Harding Boulevard in the City of San Antonio, Bexar County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200803023
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 11, 2008

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Notice of Water Rights Application

Notice issued June 5, 2008.

APPLICATION NO. 23-939B; Lorenzo Hernandez, P.O. Box 892, Presidio, Texas 79845, applicant, has applied for an amendment to Certificate of Adjudication No. 23-939 to add instream purpose of use to the current authorization on the Rio Grande, Rio Grande Basin. More information on the application and how to participate in the permitting process is given below. The application was received on January 7, 2008. Additional information and fees were received on February 12 and March 17, 2008. The application was declared administratively complete and filed with the Office of the Chief Clerk on April 1, 2008. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "I/We request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Texas Commission on Environmental Quality (TCEQ) Office of the Chief Clerk at the address provided below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200803024
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 11, 2008

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Centronics LLC	L06164	Houston	00	05/14/08
Nassau Bay	Malladi S Reddy MD	L06165	Nassau Bay	00	05/13/08
Throughout Tx	Nondestructive & Visual Inspection LLC	L06162	Carthage	00	05/15/08
Throughout Tx	Geoinstruments Logging LLC	L06160	Nacogdoches	00	05/15/08

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Allen	Presbyterian Hospital Of Allen	L05765	Allen	14	05/20/08
Angleton	Isotherapeutics Group LLC	L05969	Angleton	06	05/23/08
Austin	Austin Radiological Association	L00545	Austin	145	05/22/08
Austin	ARA Imaging	L05862	Austin	33	05/16/08
Austin	ARA Imaging	L05862	Austin	34	05/27/08
Austin	ARA Imaging	L05862	Austin	32	05/15/08
Azel	Harris Methodist Northwest	L03230	Azel	29	05/27/08
Beeville	Christus Spohn Health System Corporation DBA Christus Spohn Hospital Beeville	L04510	Beeville	27	05/14/08
Bryan	St.Joseph Regional Health Center	L00573	Bryan	69	05/27/08
Burnet	Daughters of Charity Health Services of Austin DBA Seton Highland Lakes	L03515	Burnet	34	05/28/08
Carrollton	Trinity MC LLC DBA Trinity Medical Center	L03765	Carrollton	57	05/14/08
College Station	Cancer Physicians Associated PA	L05790	College Station	09	05/12/08
Corpus Christi	Spohn Hospital	L02495	Corpus Christ	96	05/27/08
Cypress	North Cypress Medical Center Operating Co LLC DBA North Cypress Medical Center	L06020	Cypress	09	05/16/08
Cypress	North Cypress Medical Center Operating Co LLC DBA North Cypress Medical Center	L06020	Cypress	08	05/14/08
Dallas	Texas Oncology PA DBA Sammons Cancer Center	L04878	Dallas	40	05/28/08
Dallas	Dallas Cardiology Associates PA DBA Heartplace-Charleton Methodist	L05541	Dallas	07	05/15/08
Dallas	Cardinal Health	L05610	Dallas	12	05/16/08
Dallas	James D. Boehrer MD	L05508	Dallas	04	05/15/08
Dallas	Methodist Hospitals of Dallas Radiology Services	L00657	Dallas	56	05/19/08
Dallas	Texas Instruments Incorporated	L05048	Dallas	10	05/19/08
El Paso	Guillermo A. Pinzon MD PA	L04277	El Paso	15	05/21/08
Fort Worth	Harris Methodist Fort Worth	L01837	Fort Worth	113	05/22/08
Fort Worth	Baylor All Saints Medical Center DBA Baylor Medical Center at Southwest Fort Worth	L04105	Fort Worth	28	05/13/08
Friendswood	Raj Bhalla MD PA	L05469	Friendswood	04	05/21/08
Hallsville	Southwestern Electric Power Company	L03297	Hallsville	21	05/29/08
Houston	Leachman Cardiology Associates PA	L05229	Houston	09	05/27/08
Houston	Petrochem Inspection Services, Inc.	L04460	Houston	87	05/28/08
Houston	Nuclear Imaging Services	L05775	Houston	41	05/29/08
Houston	American Diagnostic Tech LLC	L05514	Houston	47	05/27/08
Houston	University of Texas Health Science Center at Houston	L03685	Houston	33	05/27/08
Houston	M. Basith Baig MD PA	L05666	Houston	03	05/27/08

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Institute of Biosciences and Technology	L04681	Houston	28	05/15/08
Houston	CHCA West Houston LP DBA West Houston Medical Center	L05808	Houston	11	05/15/08
Houston	Memorial Hermann Hospital System, Inc. DBA Memorial Hermann Hospital	L00650	Houston	86	05/15/08
Houston	Northwest Houston Cardiology PA	L05823	Houston	04	05/15/08
Houston	TH Healthcare LTD.	L02071	Houston	56	05/19/08
Houston	Baker Hughes Oilfield Operations, Inc. DBA Baker Atlas	L05104	Houston	12	05/19/08
Katy	Cardiology Center of Houston PA	L05400	Katy	08	05/12/08
Lubbock	Cardiologist of Lubbock	L05038	Lubbock	21	05/19/08
McAllen	Columbia Rio Grande Healthcare LP	L03288	McAllen	48	05/12/08
McKinney	Raytheon Company	L05623	McKinney	06	05/23/08
Midland	Midland County Hospital District DBA Midland Memorial Hospital	L00728	Midland	89	05/19/08
Nacogdoches	Nacogdoches Heart Clinic	L04382	Nacogdoches	14	05/27/08
Odessa	Golden Cat Scan and MRI Center	L04770	Odessa	08	05/27/08
Orange	Invista, Inc.	L05777	Odessa	05	05/27/08
Pasadena	Microtech Services, Inc.	L04656	Pasadena	12	05/27/08
Plano	Presbyterian Hospital of Plano	L04467	Plano	48	05/14/08
Port Arthur	The Medical Center of Southeast Texas LP	L01707	Port Arthur	67	05/28/08
Richardson	Richardson Hospital Authority DBA Richardson Regional Medical	L02336	Richardson	48	05/27/08
San Angelo	Russell T Gully DBA SKG Engineering	L05918	San Angelo	03	05/22/08
San Antonio	Sioco Cardiology PA	L05662	San Antonio	02	05/27/08
San Antonio	Snip and Ference PA	L00106	San Antonio	22	05/27/08
San Antonio	San Antonio Heart Associates PA	L04860	San Antonio	22	05/13/08
San Antonio	Petnet Solutions, Inc.	L05569	San Antonio	19	05/20/08
San Marcos	Texas State University	L03321	San Marcos	25	05/16/08
Seguin	Structural Metals, Inc. DBA CMC Steel Texas	L02188	Seguin	21	05/27/08
Sherman	Sherman Heart Group LLP	L05498	Sherman	10	05/16/08
Throughout Tx	Desert Industrial-Ray LP	L04590	Abilene	82	05/16/08
Throughout Tx	Texas Dept of Transportation Construction Division Materials & Pavements Section	L00197	Austin	138	05/22/08
Throughout Tx	Applied Standards Inspection, Inc.	L03072	Beaumont	102	05/15/08
Throughout Tx	Professional Services Industries	L04939	Corpus Christi	11	05/27/08
Throughout Tx	Geotel Engineering, Inc.	L05674	Dallas	03	05/27/08
Throughout Tx	Terracon Consultants, Inc.	L05268	Dallas	26	05/15/08
Throughout Tx	IRISNDT, Inc.	L04769	Deer Park	55	05/15/08
Throughout Tx	Sunbelt Laboratories, Inc.	L03926	El Paso	15	05/27/08
Throughout Tx	Pre-Test Laboratory	L02524	Georgetown	14	05/28/08
Throughout Tx	Northeastern Pavers, Inc.	L05665	Granbury	02	05/27/08
Throughout Tx	General Inspections Services, Inc.	L02319	Hempstead	42	05/27/08
Throughout Tx	Halliburton Energy Services, Inc.	L00442	Houston	114	05/20/08
Throughout Tx	Halliburton Energy Services, Inc.	L00442	Houston	115	05/22/08
Throughout Tx	RDT Pipeline Services USA LP	L05985	Houston	08	05/20/08
Throughout Tx	Marco Inspection Services LLC	L06072	Kilgore	12	05/20/08
Throughout Tx	Acuren Inspection, Inc.	L01774	La Porte	245	05/21/08
Throughout Tx	Professional Services Industries	L04941	Longview	08	05/27/08
Throughout Tx	Etech Environmental & Safety Solutions, Inc.	L05957	Odessa	01	05/27/08
Throughout Tx	Big State X-Ray	L02693	Odessa	69	05/28/08
Throughout Tx	Turner Industries Group LLC DBA Pipe Fabrication Division Texas Operations	L05237	Paris	20	05/15/08
Throughout Tx	Techcorr USA LLC	L05972	Pasadena	45	05/22/08

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Midwest Inspections Services	L03120	Perryton	107	05/29/08
Throughout Tx	Century Inspection, Inc.	L00062	Ponder	107	05/16/08
Throughout Tx	Professional Services Industries	L04946	San Antonio	09	05/27/08
Throughout Tx	Alumax Mill Products, Inc.	L04663	Texarkana	13	05/27/08
Throughout Tx	Professional Services Industries	L04943	Victoria	06	05/27/08

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Wichita Falls	Saint-Gobain Vetrotex American, Inc.	L02269	Wichita Falls	36	05/28/08

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Channelview	Phoenix Tubular Resources, Inc.	L05122	Channelview	03	05/15/08
Throughout Tx	Amarillo Road Company	L05063	Amarillo	02	05/28/08

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC) Chapter 289, regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200802991
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: June 9, 2008

♦ ♦ ♦

Texas Department of Housing and Community Affairs

Multifamily Housing Revenue Bonds (Providence Town Square Apartments) Series 2008

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at JP Dabbs Elementary School, 302 E. Lambuth Lane, Deer Park, Texas 77536, at 6:00 p.m. on July 9, 2008, with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $15,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Providence Town Square Housing, Ltd., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing, and equipping a multifamily housing development for seniors (the "Development") described as follows: 252-unit multifamily residential rental development located at approximately 3801 Center Street, Harris County, Texas. Upon the issuance of the Bonds, the Development will be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Teresa Morales at the Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941; (512) 475-3344; and/or teresa.morales@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Teresa Morales in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Teresa Morales prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Teresa Morales at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200802897
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: June 5, 2008

♦ ♦ ♦

Request for Applications for Weatherization Assistance Program in Hidalgo and Maverick Counties

I. Background and Purpose of the Weatherization Assistance Program.

The Texas Department of Housing and Community Affairs (the Department) administers the Weatherization Assistance Program (WAP) funded by the U.S. Department of Energy (DOE) and the Low Income Home Energy Assistance Program (LIHEAP) funded through the U.S. Department of Health and Human Services. The WAP is operated in all 254 counties in Texas. The Energy Conservation in Existing Buildings Act of 1976 established the WAP for Low-Income Persons. Current categorical funding for the program is derived from the DOE and partially funded by the LIHEAP grant. The program is designed to increase the energy efficiency of dwellings owned or occupied by low-income persons, reduce their total residential expenditures, and improve their health and safety; especially for low-income persons who are particularly vulnerable such as the elderly, persons with disabilities, families with children, high residential energy users, and households with high energy burden.

II. Request for Applications Qualifications

The Department is currently seeking Request for Applications (RFA) from eligible entities to provide WAP services to eligible clients in Hidalgo and Maverick counties. Organizations eligible to apply must be a private nonprofit organization or a political subdivision of the State. The new WAP entity may be a private nonprofit organization (which may include an existing CSBG eligible entity) that is geographically located in the service area; a private nonprofit that is geographically located in an area contiguous to or within reasonable proximity of the service area and that is already providing related services in the service area; or, if no private nonprofit organization is identified to serve the service area as an eligible entity, then a political subdivision of the State may be designated to serve as the WAP entity for the area. For this application, eligible applicant organizations must be willing to serve, Hidalgo County, Maverick County, or both counties.

The WAP funds must be used to increase the energy efficiency of dwellings owned or occupied by low-income persons, reduce their total residential expenditures, and improve their health and safety, especially low income persons who are particularly vulnerable such as the elderly, persons with disabilities, families with children, high residential energy users, and households with high energy burden. Typical weatherization work includes the installation of attic and wall insulation, caulking, weather-stripping, repair or replacement of inefficient appliances, doors, windows, and minor energy-related repairs. The type of weatherization that a household may receive is contingent upon a household's income eligibility, a comprehensive assessment of the household's energy efficiency, and the availability of weatherization funds.

III. Contract Period

The Department anticipates entering into a 8 month contract, beginning August 1, 2008 through March 31, 2009 The Department will consider renewing the contract for an additional 12 months if performance requirements are met and the contracted entity is in good standing with the Department.

The Request for Application (RFA) will be posted on the Department's web site http://www.tdhca.state.tx.us. Organizations on the Department's interested party list will receive an e-mail notification that the RFA is available on the Department's web site.

Deadline for receipt: Monday July 21, 2008 by 5:00 p.m. Central Standard Time.

Mailing Address:

Michael DeYoung

Energy Assistance Section

Texas Department of Housing and Community Affairs

Post Office Box 13941

Austin, Texas 78711-3941

(All U.S. Postal Services including Express)

Courier Delivery:

Texas Department of Housing and Community Affairs

221 East 11th Street, 1st Floor

Austin, Texas 78701

(FedEx, UPS, Overnight)

Hand Delivery:

Contact Michael DeYoung at (512) 475-2125 or Marco Cruz at (512) 475-3860 when you arrive in the lobby.

Questions pertaining to the content of this RFA may only be directed to Michael DeYoung at email address michael.deyoung@tdhca.state.tx.us or by phone at (512) 475-2125.

TRD-200803026
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: June 11, 2008

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Texas Department of Insurance

Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of INVESTMENT SALES CORP., a domestic third party administrator. The home offfice is DALLAS, TEXAS.

Application of COMPLEMENTARY HEALTHCARE PLANS, INC. (using the assumed name THE CHP GROUP), a foreign third party administrator. The home office is PORTLAND, OREGON.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-200803030

Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: June 11, 2008

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Texas Department of Public Safety

Request for Qualifications - 405-HQ8-9111 - REPOST
Agreement for Internal Audit and Risk Assessment Services

PURPOSE

The Texas Department of Public Safety (TXDPS or Department) is seeking to enter into a contract, under which highly qualified auditors will provide governmental auditing, accounting expertise and risk assessment services for fiscal years 2008 through 2009. The successful vendor will work with the Director of Audit and Inspection (Director or Project Manager) to do the following: (a) complete certain internal audit projects; (b) evaluate and contribute to the improvement of risk management and control processes within the Department; and (c) provide internal auditing services to include risk assessments, informal and formal advice, analysis, or assessments of Department business processes, governance processes, and related controls.

BACKGROUND

The Office of Audit and Inspection plans and conducts internal audits appraising the effectiveness, efficiency, and reliability of the Department's administrative, information technology, and accounting systems and controls. Due to staff retention issues in recent years, the fiscal year 2008 Internal Audit Plan cannot be completed without outsourced assistance. Furthermore, the function would benefit from on-going outsourced support in fiscal year 2009 as the Office of Audit and Inspection continues to provide the Department with internal auditing services. The Department is a dynamic organization that manages ever increasing challenges to its limited resources in the accomplishment of its operating objectives. It is imperative that the Department takes every opportunity to ensure its processes are as effective and efficient as possible. A vendor is needed to provide auditing services on a broad range of operational/financial topics relative to the Department's business processes, governance processes, and related controls.

In addition, the Department seeks an independent risk assessment of all Department programs and related auditable units. The purpose of such an assessment will be to develop the Department's annual internal audit plan.

REQUIREMENTS

The selected vendor must comply with the requirements of Chapter 2102 of the Government Code (Internal Auditing) and §§411.241 - 411.243 of the Government Code.

TXDPS is seeking highly qualified auditors to:

1. Complete approximately 1400 hours of internal audit work planned for fiscal year 2008, on or before the date required in the posted RFQ. The initial objective for this project is general audit work and has been established by the Director. The objective will be defined in the RFQ which will be posted on the Electronic State Business Daily.

The vendor will be expected to keep the Director appropriately informed as the project proceeds and complete the following:

* A preliminary assessment of the risks relevant to the activity to be audited

* A refinement of the initial audit objectives based on the risk assessment

* Establish the scope of the audit project

* An audit program to complete the project

* Conduct the audit by identifying, analyzing, evaluating, and recording sufficient reliable information to support conclusions reached

* Write a report on the audit findings to include a background section and an audit results section, including any audit recommendations developed and a section that concisely states the audit objective(s), audit scope, and the audit methodologies used to complete the project.

The Director will present the report to TXDPS management and solicit their responses to any audit recommendations developed.

2. Complete a risk assessment for internal audit planning purposes, to include all Department programs and their auditable units. The assessment is to be completed on or before the date required in the posted RFQ and delivered to the Director no later than the date required in the posted RFQ. At the Department's discretion, the Department may also request another risk assessment in fiscal year 2009 to be conducted in May and June of 2009, to be completed and delivered to the Director by July 1, 2009.

3. Upon request, provide internal auditing services to include the following in accordance with Chapter 2102 of the Government Code (Internal Auditing) and §§411.241 - 411.243 of the Government Code:

(A) ensure that operations are conducted efficiently, uniformly, and in compliance with established procedures;

(B) make recommendations for improvements in operational performance;

(C) promote economy, effectiveness, and efficiency within the department;

(D) prevent and detect fraud, waste, and abuse in department programs and operations;

(E) make recommendations about the adequacy and effectiveness of the department's system of internal control policies and procedures;

(F) advise in the development and evaluation of the department's performance measures;

(G) review actions taken by the department to improve program performance and make recommendations for improvement;

(H) review and make recommendations to TXDPS, so TXDPS can make recommendations to the Public Safety Commission and the legislature regarding rules, laws, and guidelines relating to department programs and operations;

(I) keep TXDPS fully informed of problems in department programs and operations, so TXDPS can inform the Public Safety Commission, the TXDPS director, and the legislature;

(J) coordinate with the TXDPS Project Manager so TXDPS can ensure effective coordination and cooperation among the State Auditor's Office, legislative oversight committees, and other governmental bodies while attempting to avoid duplication; and

(K) any other auditing services authorized by Chapter 2102 of the Government Code, including, but not limited to, assurance services, financial audits, compliance audits, economy and efficiency audits, effectiveness audits and investigations.

PROCUREMENT PROCESS

Schedule

The anticipated schedule of events pertaining to this RFQ is as follows:

Posting of the RFQ on the Electronic State Business Daily (ESBD) - June 20, 2008

Texas Register Posting - June 20, 2008

Questions due - June 30, 2008

Official Responses to Questions posted by - July 3, 2008

Responses due - July 11, 2008

Contract Execution - July 21, 2008, or as soon thereafter as practical

Inquiries and other Correspondence

Questions concerning this RFQ must be directed **in writing only via e-mail** to the appropriate TXDPS Point of Contact. Questions regarding the RFQ must clearly identify which section and paragraph of the RFQ is being referenced. Questions received after **June 30, 2008** at 3:00 p.m. will not be answered. Verbal inquiries are not acceptable and will receive no response.

Responses to Inquiries and Addenda

Questions and answers from this RFQ will be posted on the Texas Marketplace, Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/ as time permits, but no later than **July 3, 2008** at 5:00 p.m. When contacting the ESBD, Respondents must search under RFQ #405-HQ8-9111.

TXDPS reserves the right in its sole discretion to amend this RFQ to clarify, revise, supplement or delete any provision or to add new provisions. In the event that a revision of the RFQ becomes necessary, addenda will be posted on the Texas Marketplace, Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/. It is the responsibility of Respondents to check this site frequently for amendments and/or addenda to the RFQ.

In the event of a conflict between this notice and the posting on the ESBD, the posting on the ESBD controls.

TXDPS Point of Contact

Any parties interested in obtaining a complete copy of this RFQ should go to the Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/ and download it or contact the TXDPS Point of Contact below. Any correspondence regarding procurement issues (including cost, responses, etc.) for this RFQ prior to the award of any contract shall be made to the TXDPS Point of Contact below in writing only via e-mail. Specify "RFQ #405-HQ8-9111" in the subject.

TXDPS Point of Contact: Ray Miller, CTPM, Purchaser IV

TEXAS DEPARTMENT OF PUBLIC SAFETY

Accounting & Budget Control - Purchasing

5805 North Lamar Blvd., MSC 0130

Austin, Texas 78752

Phone: (512) 424-2205

Fax: (512) 424-2546

E-mail: ray.miller@txdps.state.tx.us

Evaluation Criteria and Scoring

TXDPS will comply with §2254.027 of the Texas Government Code regarding the selection of a consultant. Responses will be evaluated under the evaluation criteria outlined in the complete RFQ posted on the Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/. TXDPS reserves the right to accept or reject any or all proposals submitted. TXDPS is not obligated to execute a contract on the basis of this notice or the distribution of any RFQ. TXDPS shall not pay for any costs incurred by any entity in responding to this Notice or the RFQ.

TRD-200803029
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: June 11, 2008

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Vehicle Inspection Advisory Committee Meeting

The Texas Department of Public Safety and the Texas Commission on Environmental Quality, in accordance with Texas Administrative Code, Title 37, Part 1, Chapter 23, Subchapter I, and Texas Transportation Code, §548.006, are holding an advisory committee meeting on Wednesday, June 25, 2008, at 1:30 p.m., in the Texas Department of Public Safety Headquarters Building (Building A), 5805 North Lamar Boulevard, Austin, Texas.

The purpose of the meeting is to review, advise, and make recommendations to the Texas Department of Public Safety and the Texas Commission on Environmental Quality on rules relating to the operation of the vehicle inspection program and perform other advisory functions requested by the agencies.

Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print, or Braille, are requested to contact Captain Danny Knauth at (512) 424-2779, three working days prior to the meeting so that appropriate arrangements can be made.

TRD-200803020
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: June 11, 2008

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Public Utility Commission of Texas

Notice of a Petition for Declaratory Order

Notice is given to the public of a petition for declaratory order with the Public Utility Commission of Texas on May 30, 2008.

Docket Style and Number: Petition of W.O. Operating Company, Ltd. for Declaratory Order Interpreting Tariff and Complaint Against Southwestern Public Service Company, Docket Number 35737.

The Application: On May 30, 2008, W.O. Operating Company, Ltd. filed a petition to obtain a declaratory order on certain alleged issues within the jurisdiction of the Public Utility Commission of Texas (commission). Customer alleges that Southwestern Public Service Company (SPS) is acting in violation of the Public Utility Regulatory Act (PURA). According to applicant, this proceeding concerns an interpretation of SPS's tariffs and a complaint that SPS is violating PURA, the commission's rules and its own tariffs, and that SPS is engaging in discriminatory application of its tariffs.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing-and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas

(toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 35737.

TRD-200803012
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 10, 2008

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Notice of Application for Service Area Exception within Hutchinson County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on May 30, 2008, for an amendment to certificated service area for a service area exception within Hutchinson County, Texas.

Docket Style and Number: Application of Southwestern Public Service Company an Xcel Energy Company to Amend a Certificate of Convenience and Necessity for Electric Service Area Exception within Hutchinson County. Docket Number 35735.

The Application: Southwestern Public Service Company (SPS) filed an application for a service area boundary exception to allow SPS to provide service to a specific customer located within the certificated service area of North Plains Electric Cooperative, Inc. (NPEC). NPEC has provided a letter of concurrence for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than June 27, 2008 by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 35735.

TRD-200803011
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 10, 2008

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on June 4, 2008, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Solarity Communications LLC for a Service Provider Certificate of Operating Authority, Docket Number 35746 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, and interconnection and resale of telecommunications services to other providers.

Applicant's requested SPCOA geographic area includes the area of Texas served by all incumbent local exchange carriers.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than June 25, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35746.

TRD-200803013
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 10, 2008

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Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on June 2, 2008, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Telecom Cable, LLC for a State-Issued Certificate of Franchise Authority, Project Number 35742 before the Public Utility Commission of Texas.

The requested CFA service area includes the Weston Lakes Subdivision, Fulshear, Fort Bend County, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35742.

TRD-200803014
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 10, 2008

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Notice of Application to Amend Certificated Service Area Boundaries in Cameron County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on May 30, 2008, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County (Hacienda West Subdivision). Docket Number 35729.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville. BPUB received a letter request from Rick Cardenas requesting BPUB to provide electric utility service to a 44.796-acre tract of land for a proposed subdivision. The estimated cost to BPUB to provide service to this proposed area is $351,000.00. The area is presently undeveloped. If the application is granted the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than June 27, 2008, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at

(512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 35729.

TRD-200803010
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 10, 2008

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Texas State Technical College System

Notice of Award

Pursuant to Chapter 2254, Subchapter B and Chapter 403, Texas Government Code, the Texas State Technical College System (TSTC) publishes this notice of consulting contract award in connection with the Request for Proposals (#slr050208) for IT consulting services to assist the colleges with IT security and disaster recovery planning services. A contract was awarded to K2Share, LLC, 1500 University Drive East, Suite 100 College Station, Texas 77840.

The total amount of the contract award is $64,614. The term of the contract is July 1, 2008 through August 31, 2008. The notice of request for proposals (RFP #slr050208) was published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3695). The contract deliverables are due on or before August 31, 2008.

TRD-200803009
Sammy L. Rhodes
Associate Vice Chancellor and Chief Information Officer
Texas State Technical College System
Filed: June 10, 2008

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University of North Texas System

Notice of Intent to Enter Contract for Consulting Services

Pursuant to the provisions of Texas Government Code, Chapter 2254, the University of North Texas (UNT) System provides the Notice to notify consultants of its intent to enter into a contract for consulting services experienced in the establishment and operation of the W.W. Caruth Jr. Police Institute at the University of North Texas Dallas Campus.

Scope of Work:

The selected consulting firm will be responsible for assisting the University of North Texas System with evaluating and assessing the establishment and operation of the W.W. Caruth Jr. Police Institute at the University of North Texas Dallas Campus and developing baseline evaluation criteria and a tool for evaluation of the operation of the W.W. Caruth Jr. Police Institute.

The consulting services sought herein do not relate to services previously provided to the UNT System. The UNT System intends to award the contract for the consulting services to RAND Corporation due to proprietary reasons.

Finding by Chancellor:

The Chancellor of the University of North Texas System finds that the consulting services are necessary because the University of North Texas System does not have the specialized experience or the staff resources to achieve these objectives. The University of North Texas System believes that such expert consulting services will be cost effective, as they will ensure that ongoing evaluation and assessment of the W.W. Caruth Jr. Police Institute is conducted in an efficient and effective manner from inception.

Questions:

Questions concerning this Notification: Carrie Stoeckert, Assistant Director, University of North Texas System, 2310 North Interstate 35-E, P.O. Box 310499, Denton, Texas 76203-0499. The UNT System may in its sole discretion respond in writing to questions concerning this Invitation.

TRD-200803028
Joey Saxon
Director of Purchasing and Payment Services
University of North Texas System
Filed: June 11, 2008

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Upper Rio Grande Workforce Development Board

Request for Proposal: Child Care Services #PY08-RFP-260-010

The Upper Rio Grande Workforce Development Board (Board) is soliciting proposals from qualified organizations/individuals to provide Child Care Services. Request for Proposal (RFP) #PY08-RFP-260-010 may be requested in writing or picked up in person on and after 9:00 a.m. MDT, Friday, June 6, 2008, at the Board offices located in the Wells Fargo Bank Building, 221 N. Kansas, Suite 1000, El Paso, Texas 79901. The RFP will also be available on the Board's website (www.urgwdb.org) on and after the above date and time.

A Proposers' Conference/meeting is scheduled for this procurement. The conference will be held at 10:30 a.m. MDT, Friday, June 27, 2008, at the Board Offices located at the above address. Attendance at the Respondents' conference is not mandatory, but strongly encouraged.

Proposals to this RFP must be physically received by the Procurement Manager at the Board offices no later than 4:00 p.m. MDT, July 21, 2008.

Questions pertaining to this RFP may be directed to Jaime Monardes, Contracts and Procurement Manager, at (915) 772-2002, extension 202 or via e-mail at jaime.monardes@urgwdb.org.

TRD-200802983
Jaime Monardes
Procurement and Contracts Manager
Upper Rio Grande Workforce Development Board
Filed: June 9, 2008

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Texas Woman's University

Request for Consultant Proposals Concerning Distance Education

Eligible Proposers. Texas Woman's University (TWU) is requesting proposals under RFP-731-08-028-MD filed under the provisions of Government Code, Chapter 2254; from qualified Proposers concerning Distance Education at TWU. The eligible proposer must have considerable knowledge of distance education and the following related topics: Texas fiscal regulations, networks for distance education, budget building and cost analysis for distance education, infrastructure and support issues, professional development, planning, quality assurance in higher education, and regional issues and trends in distance education.

Description. TWU seeks to hire a consultant to make a detailed assessment of the University's Distance Education planning and activities. The consultant will focus on an assessment of TWU's organizational structure, professional and administrative support roles, and leadership for promoting and implementing distance education activities. In particular, the consultant must evaluate:

1. TWU's vision for the role and place of distance education within the University

2. TWU's organizational structure with focus on process and policy development

3. Course production process

4. Faculty training and development

5. Faculty rewards, incentives, and workload

6. Technical support services and infrastructure

7. Student services and development

8. Financial resources and costs

9. Quality assurance procedures.

This assessment must include an analysis of the appropriateness of current distance education procedures, policies and strategies to support the TWU Strategic Plan and the University's continued enrollment growth.

Dates of Project. The Consultant assessment of the University's Distance Education planning and activities will be conducted during the months July, and August with the Final report due within 60 days of the execution of the contract as result of award of this Request for Proposal (RFP).

Selection Criteria. Proposals will be selected based on the ability of consultant to carry out the requirements contained in this RFP. TWU will base its selection on demonstrated competence and qualifications of the consultant per evaluation criteria as stated in RFP.

Requesting the Proposal. A complete copy of RFP-731-08-028-MD may be obtained by writing the: Texas Woman's University Purchasing Department, P.O. Box 425619, TWU Station, Denton, Texas 76204-5619 or sending an email to mdemore@twu.edu.

Further Information. For clarifying information about this RFP, contact Maybelle DeMore, Purchasing Supervisor, mdemore@twu.edu.

Deadline for Receipt of Proposals. Proposals must be received in the TWU Purchasing Office by 2 p.m., July 8, 2008, to be considered.

TRD-200802898

Dr. Brenda Floyd

Vice President Finance and Administration

Texas Woman's University

Filed: June 5, 2008

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affecte***d. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).